STATEMENT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 230.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS W. BROWN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED FEBRUARY 27, 1913.

(22,540.)

(22,546.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 925.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS W. BROWN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1909.

No. 1691

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS W. BROWN,
Defendant in Error.

MR. M. L. BELL,
Counsel for Plaintiff in Error.

MR. JAMES C. McSHANE,
Counsel for Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

1 Pleas in the Circuit Court of the United States for the Placit
Northern District of Illinois, Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division, before the Hon. Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Wednesday, the second day of February, in the year of our Lord one thousand nine hundred and ten, being one of the days of the regular December term of said Court, begun Monday, the twentieth day of December, 1909, and of our Independence the one hundred and thirty fourth year.

H. S. STODDARD,
Clerk.

2 IN THE CIRCUIT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } 29780.

Be It Remembered, That on this day, to wit: the sixteenth day of December, 1909, come the defendant in the above entitled cause by its attorney and filed in the clerk's office of said Court a certain Transcript of Record from the Superior Court of Cook County. Which said Transcript of Record is in the words and figures following to-wit:

3 TRANSCRIPT OF RECORD FROM THE SUPERIOR COURT OF COOK COUNTY.

UNITED STATES OF AMERICA.

State of Illinois, } ss.
County of Cook. }

Pleas, before the Honorable Marcus Kavanagh, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the First day of November, in the year of our Lord one thousand nine hundred and nine and of the independence of the United States of America, the one hundred and thirty fourth.

Present:

The Honorable Marcus Kavanagh, Judge of the Superior Court of Cook County.
John E. W. Wayman, State's Attorney.
Christipher Strassheim, Sheriff of Cook County.

Attest:

CHARLES W. VAIL,
Clerk.

4 Be it remembered that heretofore, to-wit: on the 20th day of September A. D. 1909, a certain Praecipe was filed in the office of the Clerk of said Court, in words and figures following to-wit:

PRAECIPE—SUPERIOR COURT.

State of Illinois, } ss.
County of Cook. }

SUPERIOR COURT OF COOK COUNTY.

September Term, A. D. 1909.

Thomas W. Brown,
Plaintiff,
vs.
The Chicago, Rock Island and Pacific Railway Company,
Defendant.
} Case. Damages $20,000.00.

The clerk of said Court will issue a summons in the above entitled cause to said defendant in a plea of Trespass on the case to the damage of said plaintiff in the sum of twenty thousand ($20,000.00) dollars, direct the same to the Sheriff of Cook County to execute and make it returnable to the November Term of said Court, A. D. 1909.

JAMES C. MCSHANE,
Plaintiff's Attorney.

To Charles W. Vail, Esq., Clerk.
Chicago, September 20th, 1909.

5 Thereupon on the same day to-wit: on the 20th day of September, A. D. 1909, a certain People's Writ of Summons issued out of the office of the clerk of said Court and under the seal thereof, directed to the Sheriff of Cook County to execute such writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

Filed

SUMMONS—SUPERIOR COURT.

State of Illinois, } ss.
Cook County. }

The People of the State of Illinois, To the Sheriff of said County, Greeting:

We Command you that you summon The Chicago, Rock Island and Pacific Railway Company if it shall be found in your County, personally to be and to appear before the Superior Court of Cook County, on the first day of the term thereof, to be holden at the Court House, in the City of Chicago, in said Cook County, on the first Monday of November next, to answer unto Thomas W. Brown in a plea of trespass on the case to the damage of said plaintiff as it is said, in the sum of twenty thousand ($20,000.00) dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, Charles W. Vail, Clerk of our said Court, and the Seal thereof, at Chicago, aforesaid, this 20th day of September, A. D. 1909.

CHARLES W. VAIL,
Clerk.

(Seal)

Pd. 1.75
M .10

Served this writ on the within named The Chicago, Rock Island and Pacific Railway Company, a corporation, by delivering a copy thereof to George H. Crosby, Secretary of said corporation this 24th day of September, 1909.

The president of said corporation not found in my county.

CHRISTOPHER STRASSHEIM,
Sheriff.

By P. J. MCSHANE,
Deputy.

6 And afterwards, to-wit: on the 27th day of October, A. D. 1909, a certain Declaration was filed in the office of the Clerk of said Court, in words and figures following to-wit:

State of Illinois, } ss.
County of Cook. }

IN THE SUPERIOR COURT OF COOK COUNTY.

Thomas W. Brown,	Gen. No. 274959.
vs.	Term No. 7218.
The Chicago, Rock Island and Pacific Railway Company.	Case.
	Damages $20,000.00.

Thomas W. Brown, plaintiff, by James C. McShane, his attorney, complains of The Chicago, Rock Island and Pacific Railway Company, defendant, of a plea of trespass on the case.

For That Whereas, the plaintiff alleges that prior to and on, to-wit: the 28th day of May, A. D. 1909, the defendant owned, possessed, and operated a certain railroad, which extended, among other places, from Cook County, Illinois, into and through another state or states and it was then and there a common carrier by railroad and as such was then and there engaged upon, by, and in connection with its said railroad in commerce between the several states; and the plaintiff was then and there employed by the defendant in such commerce as a switchman to work and switch with certain engines and cars, which the defendant was then and there operating upon its said railroad in its said business, and as such switchman earned, to-wit: one hundred dollars per month.

And the plaintiff further alleges that at the time aforesaid and at, to-wit: South Chicago, in the County and State aforesaid, the defendant unlawfully, and contrary to the United States statute in such case made and provided, hauled, or permitted to be hauled or used upon its said railroad a certain car used in moving interstate traffic, which was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, but upon the contrary, the plaintiff alleges that one of the couplers, with which one end of the said car was equipped, was of such an improper kind and in such an inoperative and defective condition, that it could not be uncoupled without the necessity of a man going between the end of the said car and the car to which it was then coupled; and the plaintiff further alleges that it then and there became and was the duty to the de-

27. fendant as such switchman to uncouple said car from said car to which it was coupled while said cars were in motion, and as a direct result and in consequence of the said kind and condition of said coupler, he was then and there required to go and did go between the end of the said car and the car to which it was coupled in order to uncouple it from said other car, and while he was so between the ends of the said cars; and while, as he alleges, he was exercising ordinary care for his own safety, both in going between and while between the ends of the said cars, one of his feet thereby then and there became caught and fastened between a guard rail and
8 one of the rails of the track upon which said cars were then moving, and certain of the wheels of one of said cars thereby then and there passed over his said foot and leg, and his said foot and leg were thereby then and there so crushed and mangled and otherwise injured, that it became necessary to amputate his said foot and leg, and they were shortly afterwards so amputated, and divers other bones, ligaments, muscles, tendons and membranes of his body were also then and there sprained, dislocated, broken and otherwise injured, and he was cut, bruised and wounded about his head, face, limbs, and body, and sustained serious injuries to divers of his internal organs and a serious shock and injury to his spine and nervous system, and as a direct result of his said injuries, he has ever since suffered, and will continue permanently to suffer great pain, and he has become and is permanently disfigured, crippled, sick, sore, disordered and incapacitated from attending to and transacting his regular business or any ordinary business or affairs, and he has thereby been, and will continue permanently to be deprived of large earnings which he might and otherwise would have made and acquired, and he has been compelled to and did incur, expend and lay out, and will continue to be required to incur, expend and lay out for medical attention, nursing, medicines and otherwise divers large sums of money amounting to, to-wit: two hundred fifty dollars, in and about
9 endeavoring to be cured of his said injuries, sickness and disorders, occasioned aforesaid.

Second Count: And for that whereas, the plaintiff alleges, that prior to and on, to-wit: the 28th day of May, A. D. 1909, the defendant owned, possessed and operated a certain railroad extending among other places, through the county and state aforesaid, and it was then and there a common carrier engaged in moving traffic upon and by its said railroad be-

tween points in the State of Illinois, And the plaintiff was then and there employed by the defendant as a switchman in such commerce to work and switch with certain engines and cars which the defendant then and there operated upon its said railroad in its said business, and as such switchman he earned, to-wit: one hundred dollars per month.

Decla... fil... 19...

And the plaintiff further alleges that at the time and place aforesaid, the defendant unlawfully, and contrary to the state statute, in such case made and provided, hauled, or permitted to be hauled or used on its said railroad a certain car used in moving state traffic, which was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, but upon the contrary, the plaintiff alleges, that one of the couplers with which one end of the car was
10 equipped, was of such an improper kind and in such an inoperative and defective condition, that it could not be uncoupled without the necessity of a man going between the end of the said car and the car to which it was then coupled; and the plaintiff further alleges that it then and there became and was his duty as such switchman to uncouple said car from said car to which it was so coupled which said cars were in motion, and as a direct result, and in consequence of the said kind and condition of the said coupler, he was then and there required to go, and did go between the end of the said car and the car to which it was so coupled in order to uncouple it from said other car, and while he was so between the ends of the said cars, and while, as he alleges, he was exercising ordinary care for his own safety, both in going between and while between the ends of the said cars, one of his feet thereby then and there became caught and fastened between a guard rail and one of the rails of the track upon which said cars were then moving, and certain of the wheels of one of said cars thereby then and there passed over his said foot and leg, and his said foot and leg were thereby then and there so crushed and mangled and otherwise injured, that it became necessary to amputate his said foot and leg, and they were shortly afterwards so amputated, and by means of the premises the plaintiff sustained and incurred the said injuries, disabilities, loss, damages, pain, suffering and obligations as described and set forth in the first
11 count of his declaration, and to which said count for a description of the same he here refers.

Third Count: And, for that whereas, the plaintiff allages,

27. that prior to, and on, to-wit: the 28th day of May, A. D. 1909, the defendant owned, possessed and operated a certain railroad which extended, among other places, from Cook County, in the State of Illinois, into and through another state or states, and it was then and there a common carrier by railroad, and as such was then and there engaged upon, by and in connection with its said railroad in commerce between the several states; and the plaintiff was then and there employed by the defendant in such commerce as a switchman to work and switch with a certain engine and certain cars, which it was then and there operating upon its said railroad in its said business, and as such switchman he earned, to-wit: one hundred dollars per month.

And the plaintiff further alleges that the defendant, in the county and state aforesaid, long prior to and then and there, had and maintained a certain guard rail placed alongside of and so close to one of the rails of one of the tracks of its said railroad, that there was great danger of a switchman's foot being caught and fastened between the said guard rail and other rail while switching upon said track, unless the space between said guard rail and other rail was blocked or otherwise filled in; and the plaintiff alleges that it was practicable to so block or otherwise fill in said space and that
12 blocking or filling in said space would not interfere with the practical operation of said track or road, and that it was necessary to the reasonable safety of the defendant's switchman, including the plaintiff, that said space should be so blocked or filled in, and he alleges that said track was defective and not in a reasonably safe or proper condition for defendant's switchmen to switch upon unless said space was so blocked or filled in; yet the plaintiff alleges that the defendant, not regarding the premises, long prior to and at the time of the injuries hereinafter complained of, wrongfully and negligently failed and neglected to block or fill in said space between said rails, and it negligently maintained said track and required its switchmen, including the plaintiff, to work and switch upon the same when and while the space between said guard rail and other rail was not blocked or filled in and all of which facts he alleges, the defendant knew, or by the exercise of ordinary care in that behalf would have known a sufficient length of time prior to the injuries hereinafter complained of to have enabled it by the exercise of ordinary care to have blocked or filled in the said space between said guard rail and other rail.

13 And the plaintiff further alleges that at the time and place aforesaid, while the defendant was engaging in and the plaintiff was employed in such interstate commerce, he, the plaintiff, while in the discharge of his duty to the defendant was switching with a certain engine and train of cars upon and along said track, and it then and there became and was his duty to uncouple two of the cars in said train at the place where said guard rail was located, as aforesaid, and it became and was necessary for him to step in between said cars and upon said track in order to uncouple said car, and he then did so, and while he was so between the said cars for said purpose, and while they were moving slowly along said track, and while, as he alleges, he was in all respects in the exercise of ordinary care for his own safety, as a direct result and in consequence of the defendant's negligent failure to so block or fill in the space between said guard rail and other rail, and negligently requiring him to switch upon said track when said space between said guard rail and other rail was not filled in, as aforesaid, one of his feet were thereby then and there caught and fastened in said space between said guard rail and other rail, and before he was able to extricate his said foot one or more of the wheels of one of said cars then and there ran upon and over his said foot and leg, and his said foot and leg were thereby then and there so

14 crushed, mangled, torn, and injured, that it became necessary to amputate his said foot and leg, and they were shortly afterwards so amputated, and by means of the premises the plaintiff sustained and incurred the said injuries, disabilities, loss, damage, pain, suffering and obligations as described and set forth in the first count of this declaration and to which said count for a description of the same he here refers.

Fourth Count: And for that whereas, the plaintiff alleges that prior to and on, to-wit: the 28th day of May, A. D. 1909, the defendant owned, possessed and operated a certain railroad extending, among other places, through a part of the county and state aforesaid; and plaintiff was then and there employed by the defendant as a switchman to work and switch with certain engines and cars which it was then and there operating upon its said railroad, and as such switchman he earned, to-wit: one hundred dollars per month.

And the plaintiff further alleges that the defendant, long prior to and then and there had and maintained a certain guard rail placed alongside of and so close to one of the rails

n, t. 27, of one of the tracks of its said railroad, in the county and state aforesaid, that there was great danger of a switchman's foot being caught and fastened between said guard rail and other rail while switching upon said track unless the space between said guard rail and other rail was blocked, or otherwise filled in. And the plaintiff alleges that it was practicable to so block or otherwise fill in said space, and that
15 blocking or filling in said space would not interfere with the practical operation of said track or road, and it was necessary to the reasonable safety of defendant's switchmen, including the plaintiff, that said space should be so blocked and filled in, and he alleges that said track was defective and not in a reasonably safe or proper condition for switchmen to switch upon, unless said space was so blocked or filled in; yet the plaintiff alleges that the defendant, long prior to and at the time of the injuries hereinafter complained of, wrongfully and negligently maintained said track, and required its switchmen, including the plaintiff, to work and switch upon the same when and while the space between said guard rail and other rail was not blocked or filled in, and all of which facts, he alleges, the defendant knew, or by the exercise of ordinary care in that behalf would have known a sufficient length of time prior to the injuries hereinafter complained of to have enabled it by the exercise of ordinary care to have blocked or filled in said space between said guard rail and other rail, but that it negligently failed and neglected so to do. And the plaintiff further alleges that he, through no want of ordinary care upon his part did not then know that said space between said guard rail and other rail was not so blocked or filled in and he did not understand and appreciate the risk or danger to which he was thereby exposed; and the plaintiff further alleges that at the time and place aforesaid, he, the plaintiff, in the discharge of his duty to the de-
16 fendant as such switchmen, was switching with a certain engine and train of cars upon and along said track, and it then and there became and was the duty to uncouple two of the cars in said train at the place where said guard rail was located, as aforesaid, and it became and was necessary for him to step in between said cars, and upon said track in order to uncouple them, and he did so, and while he was so between the said cars for said purpose, and while said cars were moving slowly along said track, and while, as he alleges he was in all respects in the exercise of ordinary care for his own safety, as a direct result and in consequence of

the defendant's negligent failure to so block or fill in the space between said guard rail and other rail as aforesaid, and in negligently requiring him to so switch upon said track, one of his feet was thereby then and there caught and fastened in said space between said guard rail and other rail, and before he was able to extricate his said foot, one or more of the wheels of one of said cars then and there ran upon and over his said foot and leg, and his said foot and leg were thereby then and there so crushed, mangled, torn and injured, that it became necessary to amputate his said foot and leg above the knee, and they were shortly afterwards so amputated, and by means of the premises the plaintiff sustained and incurred the said injuries, disabilities, loss, damages, pain, suffering and obligations described and set forth in the first count of this declaration, and to which said count for a description of the same he here refers. Declar filed 1909.

17 To the damage of the plaintiff of $20,000.00; wherefore, he brings this suit, etc.

JAMES C. McSHANE,
Attorney for Plaintiff.

And afterwards to-wit, on the 1st day of December, A. D. 1909, a certain petition was filed in the office of the clerk of said Court, in words and figures following to-wit: Petiti mo Dec

State of Illinois, } ss.
County of Cook. }

IN THE SUPERIOR COURT OF COOK COUNTY.

Thomas W. Brown,	Gen. No. 274959.
vs.	Term No. 7218.
The Chicago, Rock Island and Pacific Railway Company.	Case. Damages $20,000.00.

PETITION FOR REMOVAL.

To the Honorable, the Judges of the said Superior Court.

Your petitioner, The Chicago, Rock Island and Pacific Railway Company, defendant in the above entitled action respectfully represents and shows to your Honors:

That this is a suit at law of a civil nature; that it appears upon the face of the plaintiff's declaration filed herein that

for re-filed 1909. the cause of action herein arises under the laws of the United States, the same being a suit brought by an employe of an interstate railroad company to enforce a liability created by an Act of Congress, approved April 22, 1908, entitled "An Act relating to the liability of common carriers by
18 railroad to their employes in certain cases: "and also being a suit brought by an employe of an interstate common carrier to recover damages by reason of the alleged violation by the defendant of an Act of Congress, approved March 2, 1893, entitled "An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," as the same is amended by act of March 2, 1903. For a further statement of said cause of action your petitioner refers to the declaration heretofore filed herein and asks that the same may be considered part of this petition.

That the amount involved in this suit, as described in the declaration, exclusive of interest and costs, exceeds the sum or value of $2,000.00.

Your petitioner herewith presents a good and sufficient bond as provided by the statute in such cases, that it will, on or before the first day of the next ensuing session of the Circuit Court of the United States, for the Northern District of Illinois, Eastern Division, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said Court, if the said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

19 Your petitioner therefore prays that this Court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

By M. L. BELL,
Its Attorney.

M. L. BELL,
Attorney for Petitioner.

State of Illinois, } ss.
County of Cook. }

Affidav
M. L.

IN THE SUPERIOR COURT OF COOK COUNTY.

Thomas W. Brown,	Gen. No. 274959.
vs.	Term No. 7218.
The Chicago, Rock Island and Pacific Railway Company.	Case. Damages $20,000.00.

AFFIDAVIT.

M. L. Bell, being on oath duly sworn, states that he is attorney for the petitioner, The Chicago, Rock Island and Pacific Railway Company, in the above entitled cause, that he is acquainted with the contents of the foregoing petition for removal, and that the same is true.

M. L. BELL.

Subscribed and sworn to before me this 30th day of November, 1909.

CHAS. T. SCHWARTZ,
Notary Public.

(Seal)

20 And on to-wit: on the 1st day of December, A. D. 1909, a certain bond was filed in the office of the clerk of said court, in words and figures following to-wit:

Bond
Dec

State of Illinois, } ss.
County of Cook. }

IN THE SUPERIOR COURT OF COOK COUNTY.

Thomas W. Brown,	Gen. No. 274959.
vs.	Term No. 7218.
The Chicago, Rock Island and Pacific Railway Company.	Case. Damages $20,000.00.

Know All Men by these Presents:

That we, The Chicago, Rock Island and Pacific Railway Company, a corporation, as principal, and the National Surety Company, as surety, are held and firmly bound unto Thomas W. Brown, the plaintiff in the above entitled cause, his heirs, executors, administrators and assigns, in the sum

d 1909. of five hundred dollars ($500.00) lawful money of the United States, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our successors and assigns, jointly and severally, by these presents.

The Condition of this obligation are such that:

Whereas, the said The Chicago, Rock Island and Pacific Railway Company has applied by petition to the Superior Court of Cook County, Illinois, for the removal of a certain cause therein pending wherein Thomas W. Brown is plaintiff, and the said The Chicago, Rock Island and Pacific Railway Company is defendant, to the Circuit Court of the 21 United States for the Northern District of Illinois, Eastern Division, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in the said Superior Court be stayed.

Now, therefore, if your petitioner, the said The Chicago, Rock Island and Pacific Railway Company shall enter in said Circuit Court of the United States for the Northern District of Illinois, Eastern Division, on or before the first day of the next regular session thereof, a copy of the records in said suit and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States if the said Court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

In witness whereof, the said The Chicago, Rock Island and Pacific Railway Company, as principal, and the National Surety Company, as surety, by their proper officers have executed and attested these presents this 29th day of November A. D. 1909.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

By H. A. MUDGE,
Second Vice President.

(Seal)

Attest:
GEO. H. CROSBY,
Secretary.

NATIONAL SURETY COMPANY,

(Seal) By HOMER H. McKEE,

Attest:
M. B. MILLER.

Approved:

MARCUS KAVANAGH,
Judge.

22 And on to-wit: on the 1st day of December, A. D. 1909, a certain Notice was filed in the office of the clerk of said Court, in words and figures following to-wit: Notice Dec

State of Illinois } ss.
County of Cook. }

IN THE SUPERIOR COURT OF COOK COUNTY.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company.

Gen. No. 274959.
Term No. 7218.
Case. Damages $20,000.00.

NOTICE.

To James C. McShane, attorney for plaintiff:

You are hereby notified that tomorrow, Wednesday morning, December 1, 1909, at 10 o'clock, or as soon thereafter as counsel can be heard before His Honor Judge Kavanagh, in the court room usually occupied by him, I shall file a petition praying for the removal of the above entitled cause to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. Copy of said petition is hereto attached. I shall also present a bond, as stated in said petition, in the sum of five hundred dollars ($500.00) with the National Surety Company, as surety thereon. At which time and place you may appear if you see fit.

M. L. BELL,
Attorney for Defendant.

Received a copy of the above notice and petition for removal this thirtieth day of November, 1909.

JAMES C. McSHANE.

23 And on to-wit: the 1st day of December A. D. 1909, the following proceedings were had and entered of record in said court to-wit:

Dec.

Thomas W. Brown,
vs.
274959
The Chicago, Rock Island and Pacific Railway Company.
} Case.

On motion of defendant's attorney and on filing petition and bond it is ordered that this cause be and is hereby transferred to the United States Circuit Court in and for the Northern District of Illinois, Eastern Division, and that the clerk of this court forthwith transmit to said United States Circuit Court a full and complete transcript of all papers and pleadings filed herein, together with all orders made and entered of record in said cause.

State of Illinois, } ss.
County of Cook. }

I, Charles W. Vail, Clerk of the Superior Court of Cook County in and for the State of Illinois and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record in a certain cause lately pending in said Court on the law side thereof wherein Thomas W. Brown was plaintiff and The Chicago, Rock Island and Pacific Railway Company defendant.

24 In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Chicago, this 6th day of December, A. D. 1909.

CHARLES W. VAIL,
(Seal) *Clerk.*

(Endorsed) Filed Dec. 16, 1909, H. S. Stoddard, Clerk.

25 And on to-wit: the sixteenth day of December, 1909, come the defendant in said entitled cause and filed in the clerk's office of said Court its certain Plea in the words and figures following to-wit:

PLEA.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

State of Illinois, } ss.
County of Cook. }

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. Law.

Plea.

And the defendant, The Chicago, Rock Island and Pacific Railway Company, by M. L. Bell, its attorney, comes and defends the wrong and injury when, etc., and as to the first, second and fourth counts of the said declaration, says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against it, the defendant; and of this it puts itself upon the country, etc.

M. L. BELL,
Attorney for Defendant.

(Endorsed) Filed Dec. 16, 1909, H. S. Stoddard, Clerk.

26 And on the sixteenth day of December, 1909, come the defendant in said entitled cause by its attorney and filed in the clerk's office of said Court, its certain demurrer in words and figures following to-wit:

filed 1909.

DEMURRER.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

State of Illinois, } ss.
County of Cook. }

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. Law.

Demurrer.

And the defendant, The Chicago, Rock Island and Pacific Railway Company, by M. L. Bell, its attorney, comes and defends etc., when, etc., and says that the third count of the said declaration and the matters therein contained, as the same are above set forth, are not sufficient in law for the plaintiff to mantain his aforesaid action, and this it is ready to verify; Wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action, etc.

And the defendant shows to the court here the following causes of demurrer to the said third count of said declaration, that is to say:

27 This is a suit at law of a civil nature arising under the Constitution and laws of the United States, it being an action brought by an employe of the defendant, a common carrier engaged in interstate commerce, to recover damages resulting from the alleged negligence of the officers, agents or employes of said common carrier, and by reason of alleged defects in its cars and appliances; the right of action, if any, herein, arising under an act of Congress, approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases."

1. That said act of Congress is not passed in pursuance of any power conferred upon Congress by the Constitution of the United States, that the subject matter of the act, namely,

the liability of interstate common carriers for injuries arising to their employes from the negligence of said carriers of their agents is not a regulation of commerce among the several states, and is not within the scope of authority vested in the Congress.

2. That said act is repugnant to the fifth amendment to the Constitution of the United States, in this, to-wit: that it deprives this defendant of the right of entering into contracts with its employes for employment, insurance, relief, benefit or indemnity for injury or death, that it interferes with the liberty of contract of this defendant in that it deprives all such contracts of any binding force whatever, without the consent and against the will of the defendant; and leaves the defendant and all other interstate common carriers without power to enter into such contracts.

28 3. That said act is repugnant to the fifth amendment to the Constitution of the United States, in this, to-wit:

(1) It includes within its provisions interstate employes of railroads alone, and, in consequence, it does not bring within this class all employes similarly situated, namely,

(a) The interstate employes of other interstate carriers, and

(b) The interstate employes of all other persons engaged in interstate commerce.

(2) The language of the Act includes within its terms not only those railroad employes whose occupations are attended by the hazards peculiar to railroading, but also all other employes of railroads whose occupations are in no wise attended with such hazards.

(3) The Act includes within its terms one class only of interstate employers, to-wit, railroads; and this without regard to the hazards of the employment.

(4) That the said act is repugnant to the seventh Amendment to the Constitution of the United tSates in that it permits facts tried by a jury to be examined otherwise than according to the common law, in violation of said amendment to the Constitution.

Wherefore, for want of a sufficient declaration in this behalf the defendant prays judgment and that the plaintiff may be barred, etc.

M. L. Bell,
Attorney for Defendant.

Filed 29 State of Illinois } ss.
1909. County of Cook. }

M. L. Bell, state- on oath that he is attorney for the defendant, The Chicago, Rock Island and Pacific Railway Company in the above entitled action, that the foregoing demurrer is true in point of fact, and is not interposed for delay.

M. L. BELL.

Subscribed and sworn to before me, this 16th day of December, A. D. 1909.

CHAS T. SCHWARZ,
(Seal) *Notary Public, Cook County, Illinois.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

M. L. BELL.

(Endorsed) Filed Dec. 16, 1909, H. S. Stoddard, Clerk.

26. 30 And on to-wit: the twenty-sixth day of January, 1910, there was filed in the clerk's office of said Court in said entitled cause a certain Stipulation in words and figures following to-wit:

STIPULATION.

United States of America,
Northern District of Illinois, } ss.
Eastern Division at Chicago.

IN THE UNITED STATES CIRCUIT COURT.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. 29780.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above entitled cause, that in order not to delay the trial of the said cause, the defendant will withdraw its demurrer to the third count of the declaration and shall file a

plea of general issue thereto. The defendant, by so withdrawing its demurrer, shall not be considered to have waived its right to attack the constitutionality of the Federal Employers' Liability Act, either by objections to the evidence, by requesting instructions, or by excepting to the charge of the Court to the Jury, or by a motion for a new trial, or in arrest of judgment. Stipu... fil... 191...

JAMES C. MCSHANE,
Attorney for Plaintiff.
M. L. BELL,
Attorney for Defendant.

(Endorsed) Filed Jan., 26, 1910, H. S. Stoddard, Clerk.

31 And on to-wit: the twenty-sixth day of January, 1910, come the defendant in said entitled cause by its attorney and by leave of Court first had and obtained filed in the clerk's office of said Court its certain Plea of General Issue in words and figures following to-wit: Plea... iss... Ja...

PLEA OF GENERAL ISSUE.

United States of America,
Northern District of Illinois, } ss.
Eastern Division at Chicago.

IN THE UNITED STATES CIRCUIT COURT.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. 29780.

Plea.

And the defendant, The Chicago, Rock Island and Pacific Railway Company, by M. L. Bell, its attorney, comes and defends the wrong and injury when, etc. and as to the third count of the said declaration, says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff has above thereof complained against it, the defendant; and of this it puts itself upon the country, etc.

M. L. BELL,
Attorney for Defendant.

(Endorsed) Filed Jan., 26, 1910, H. S. Stoddard, Clerk.

32 And on to-wit: the twenty-sixth day of January, 1910, being one of the days of the regular December term of said Court, 1909, in the record of proceedings thereof, in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

ORDER OF JANUARY 26, 1910, CALLED FOR TRIAL AND JURY SWORN.

Thomas W. Brown,
vs.
Chicago, Rock Island and Pacific Railway Company. } 29780.

This case being called for trial, now come the parties by their attorneys and come also the following jurors, to-wit: Charles Strook, Guss Cook, Fred Rudolph, Fayette Thomas, Charles Murdie, Charles Ost, F. Schrapper, Louis Carstens Nat Eells, Jos. Butler, John W. Kendall and R. J. Proctor, who were all duly elected, tried and sworn to well and truly try the issues and a true verdict render according to the law and the evidence. And thereupon the demurrer to the third count of the plaintiff's declaration is withdrawn and leave is given the defendant to file instanter a plea of general issue as per written stipulation filed.

And the opening statement of the plaintiff's attorney being made, the opening statement by the defendant being waived, and the evidence for the plaintiff being heard in part when the hour for adjournment arrived, the further trial of this case is postponed until tomorrow morning.

33 And on to-wit: the twenty-seventh day of January, 1910, being one of the days of the regular December term of said court, 1909, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

ORDER OF JANUARY 27, 1910, Trial.

Evidence for Plaintiff Heard and Concluded. Trial Postponed, etc.

Thomas W. Brown,
vs.
Chicago, Rock Island and Pacific Railway Company. } 29780.

Now again come the parties by their attorneys and come also said jurors heretofore duly empaneled, tried and sworn, and the trial of this case is resumed. And thereupon the evidence for the plaintiff being further heard and concluded, the defendant enters its motion to have the court instruct said jury to return their verdict finding the defendant not guilty, and the court having heard the arguments of counsel upon said motion when the hour for adjournment arrived, the further trial of this case is postponed until tomorrow morning.

34 And on to-wit: the twenty-eighth day of January, 1910, being one of the days of the regular December term of said Court, 1909, in the record of proceedings thereof in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit: Verd 28

ORDER OF JANUARY 28, 1910,

Verdict Finding Defendant Guilty and Assessing Plaintiff's Damages at the Sum of $8,000.

Thomas W. Brown,
vs.
Chicago, Rock Island and Pacific Railway Company. } 29780.

Now again come the parties by their attorneys and come also said jury heretofore duly empaneled, tried and sworn, and the trial of this case is resumed. And thereupon the court overrules the motion of the defendant to have the court instruct said jury to return a verdict finding the defendant not guilty, to which ruling the defendant excepts. And the evidence for the defendant being now heard and concluded, the defendant renews its motion to have the court instruct said

Jan. jury to return a verdict finding the defendant not guilty, which is heard and overruled, the defendant excepting thereto. And thereupon the defendant enters its motion to remand this case to the Superior Court of Cook County Illinois, which motion is also heard and overruled, the defendant again excepting. And the arguments of counsel being now made the court instructs said jury who retire to deliberate upon a verdict, attended by a sworn bailiff.

And now on this same day come said jury and return into open court their verdict finding the defendant guilty and
35 assessing the plaintiff's damages against said defendant at the sum of eight thousand dollars, and thereupon the defendant enters its motion for a new trial.

of 1910. 36 And on to-wit: the second day of February, 1910, being one of the days of the regular December term of said court, 1909, in the record of proceedings thereof, in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

JUDGMENT OF FEBRUARY 2, 1910,

Assessing Plaintiff's Damages at the Sum of $8,000.

Thomas W. Brown,
vs.
Chicago, Rock Island and Pacific Railway Company. } 29780.

Now on this day comes the defendant by its attorney and thereupon the motion of the defendant for a new trial is heard and overruled, to which the defendant excepts, and enters its further motion in arrest of judgment which is also overruled, the defendant again excepting.

It is thereupon considered and adjudged by the court that the plaintiff have and recover from said defendant his damages so as aforesaid assessed at the sum of eight thousand dollars, together with the costs herein to be taxed and that execution issue therefor.

And the defendant now entering its motion for a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit twenty days are allowed in which to prepare and present its bill of exceptions and the bond on said writ of error is fixed in the penalty of ten thousand dollars, the same to be filed within ten days.

37 And on to-wit: the twenty-first day of February, 1910, being one of the days of the regular December term of said Court, 1909, in the record of proceedings thereof in said entitled cause before the Hon. George A. Carpenter, District Judge, appears the following entry to-wit: Order 21, 1

ORDER OF FEBRUARY 21, 1910, EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

Thomas W. Brown,
vs.
Chicago, Rock Island and Pacific Railway Company. } 29780.

On motion of the defendant, and upon stipulation filed, the time for defendant to file its bill of exceptions is hereby extended to March 1, 1910.

38 And on to-wit: the first day of March, 1910, there was filed in the clerk's office of said Court in said entitled cause a certain Bill of Exceptions in the words and figures following to-wit: Bill of tions Mar.

39 BILL OF EXCEPTIONS.

United States of America
Northern District of Illinois } ss.
Eastern Division

IN THE CIRCUIT COURT OF THE UNITED STATES.

Thomas W. Brown
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. 29780.

Bill of Exceptions.

Be it Remembered that heretofore, to wit: on Wednesday, the 26th day of January, A. D. 1910, the above entitled cause came on for trial before the Honorable Kenesaw M. Landis, one of the Judges of said Court, and a jury.
Appearances:

Mr. James C. McShane and Mr. Wm. E. Griffin, Attorneys for Plaintiff.

Mr. M. L. Bell and Mr. Charles T. Schwarz, Attorneys for Defendant.

And thereupon the plaintiff, to maintain the issues in his behalf, introduced the following evidence:

40 THOMAS W. BROWN:

Direct Examination.

My name is Thomas W. Brown; I live at 1934 Grand Avenue; I am 36 years old. This accident happened May 28th, 1908, at South Chicago. At that time I was switchman for the defendant. I had worked for them since Sept. 7, 1906, or 1907; it was nearly three years. I was on what we call the night job at South Chicago. It was a job that we had quite a lot of transfer. I had been on that job about three months; before that time I worked on all the jobs they had outside of Blue Island, jobs at 16th Street, at 51st Street, at 47th Street, at 63rd Street and South Chicago, days and nights. While on those other jobs I was brought to the place where I was hurt probably once a month and sometimes probably once a day, and while I was working nights we would not work more than an hour at that end of the yards, sometimes not that long, sometimes a little longer. Sometimes I would not get there for months and other times I would get there for a week at a time, that is, I would get in the next yard but I probably would not be in that yard once in a week. There are six tracks in the yard where I was hurt and in the next yard there are six tracks. There is room for about 65 and 47 cars on each of these tracks. They were working four switch engines days and one nights when I was working there. Mike Tierney was the conductor of the crew; he is still with the company. The engineer's name was Paul Kutsche and the fireman was John Walsh. My fellow-switchman was R. H. Lillis.

It is admitted by counsel for the defendant that the defendant's railway was engaged in interstate commerce, its principal office being in Chicago and its principal main line extending from Chicago to the Mississippi River across the state of Illinois. Its line also extended into Colorado,
41 Texas and elsewhere. In the yards in question the Rock Island Company handled cars that were delivered to it by other roads and were destined to other roads as well as its own cars. Part of these cars were engaged in interstate commerce and were used by the companies who owned them in interstate commerce.

The Rock Island's cars are used for everything I think. I have seen way bills for cars going out of there, way bills for cars going out of other states and going to other states. I have seen cards on the sides of cars that give their destination. This is what we use to go by when we get up trains. These cars were used generally anywhere they wanted them in the state and out of the state. It made no difference in the class of the cars. They operated cars in those yards of all the roads in the United States I guess. These various cars were engaged indiscriminately between the different states.

These tracks of this yard run east and west. The night of the accident I was working at the west end of the yard. The lead track ran southeast and northwest and the other tracks branched off from the lead. The lead branched off from Number 1; No. 1 branched off the main track. In a general way, our crew was engaged in transfer work, taking cars from different parts of the city and delivering them to different roads. We have taken cars back from the Illinois Central back to the Rock Island. The cars that we took from the Rock Island to the other roads would be designated by cards on the side and the way bills, some would be designated to some parts of the east with grain and some to the west. I never paid very much attention. I have seen lots of them designated as far as Denver and Cedar Rapids, Iowa, and Kansas City. I have seen some designated to New York
42 by way of the Lake Shore. In a general way they were for every point indiscriminately, in the state and outside of the state.

The night of the accident we had hold of some cars, a number of them were going to the C. & E. I. and part of them to Englewood, and we were going to take out those that were going to the C. & E. I. on one track and the number that were going to Englewood on another track. The tracks are numbered from the north to the south 1, 2, 3, 4, 5 and 6. We got these cars off No. 4, I think 10 or 12 cars. The engine was attached to the west end headed east. We backed out of No. 4 and northwest along the lead and west along No. 1 until the rear end pulled through No. 1 switch. We shoved part of them in on 1 and part of them on 2, then one we was going to put back on 4 and we was going to put the others then on 2. On this particular movement we were going to shove three or four or five cars in on 2 and then shove another one in on 4. The cut was on the southeast end of the train.

of W. After we went over No. 2 switch, I threw the switch. My next move was to give the signal to come ahead to shove the cars in on two. They responded to the signal. I suppose it was my place to cut the cars, or I could do it, as it would be Lillis' place. Either one was supposed to do that, whichever one would be there, but as a general thing Lillis did, because that was the movement he was supposed to do it, unless it was a case of going around the curve, and then the other man cut it. Lillis was the man that worked next to the engine. I worked anywhere my work called me to. I was called the field man. I knew where the cars were going to be cut by a chalk mark on them, placed on the south side of the car near to the east end. The yard clerk ordered what cars were to be cut. After I threw the switch and gave
43 the signal I walked up to near number 1 switch. In the meantime the train was shoving back on No. 2. When I got up there I seen the cut where I wanted to make it and it had passed Lillis in the meantime and I tried to pull the pin. By the cut I mean I saw the mark on the side of the cars where the cut was to be made. The cars were going and that point had passed Lillis. It was then up to me and I tried to pull the pin on this car that was going to Englewood. The car next to the engine was the car I was trying to pull the pin on. I tried to pull the pin by the lever. There is a lever that comes along the end of the car like this and the end bends over, comes down against the car, sort of an arm on the end of the lever. In a general way it is a pin lifting rod, the rod that extends from the outer end of the car and along to the center, and at the center of it, there is an arm that extends directly over the draw-bar or coupler, between 8 inches and a foot long. There is a hole in the end of the arm that extends out over the draw-bar and there is a little clevis and a little chain attached to this clevis that goes down in the pin, the pin in the draw-bar. By raising that draw-bar on the outside of the car that raises this up here (indicating), raises that arm up and by means of the chain it lifts the pin in the coupler and the car separates. That unlocks it, and when we slack the engine, stop the engine the other cars come and this stops. On some there is a contrivance by which the draw-bar is raised up when the pin is raised; this particular draw-bar that I got hurt on, sometimes it would stay up, other times you have got to hold it up. The one I was trying to pull would not stay up unless you held it, and the next one to that

would not either stay up unless you didn't hold it. Neither
44 of those two would stay up if you turned the lever. The rod was in the south end of the car and extended out to the southwest edge of the car. I got hold of the lever and jerked on it four or five times as hard as I could jerk, I took hold of lever at the outer edge of the car, the part that is turned at right angle at the end of the car, at the outer edge. It come up to pretty near where it ought to and it took out the slack in the chain, you can tell by the way it feels whether you pull the pin or just pull the slack out of the chain. You can see the difference, and I saw that I could not pull the pin and I tried the other. The pin would not come up. I made four or five attempts. The train was going about as fast as you would usually walk.

The coupling rod on the other car (the east car) would be on the east end of the car, but it would be on the opposite side. It would be on the east end of the car, but on the north side of the car, the lever. That is the way the cars was (indicating) on the lead there, it would be on the northwest end of the car and it would be on the east side. It was the side opposite me. There was no lever extending from the coupler to the side of that other car, that is to the side I was on. There was one that extended to the other side to the east. When I could not raise this coupling pin (on the west car) with the lever I reached in and got hold of the chain that is attached to this lever (on the west car) and got hold of it, thought may be—it might be twisted, but I pulled it and found slack in it and I grabbed the other chain—(on the east car) I first reached in and grabbed the chain that I tried to uncouple with the lever, but did not succeed in raising the pin with that. I grabbed the chain on the one ahead of it (the east car) and raised the pin by means of my hand with the chain. I felt my foot go. I was walking with my feet on
45 the outside of the rail. I had hold of a slide that is at the bottom of the door kind of a door runner on the car ahead of me. I was facing the way the cars were going. I had hold with my right hand on the car ahead of me, rigllt over that slide. I reached my left hand to the pin. I was walking southeast right along the side of the lead. Suppose this was the end of the car, going that way, there is a car behind, and a car in front, the draw-bar is over here (indicating center of end of car), I held on with my right hand. Here is the outside edge of the car (indicating on jury rail).

of W. (Witness leaves the witness stand and stands by railing in front of jury). This would be the car. This is the end of the car; here is the outer edge and here is the draw-bar (indicating.) There is the coupler (indicating) the car is going that way, I held on with my right hand and reached in with my left hand. I was walking this way (indicating direction cars were moving) and I reached over as far as I could, and I tried to keep my feet on the outside of the rail and I tried to catch the chain of the coupler on the east car and I stepped on top of the rail and my foot slipped and there is a low brake-beam on the car that is following it and hit my foot, just about the top of my shoe from behind, and drove it in between the guard rail and the rail. A guard rail is a rail that sits on the inside of the rail opposite the frog. You find some ten feet long and some are shorter and some a little longer. I judge it would be about an inch and a half or two inches at the top from the guard rail to the rail of the track; enough for the flange to travel in, but the bottoms of the rail sets in together. The flanges upon which the rails rest are upon the ties—those flanges are side by side; that leaves
46 the balls about that far apart (indicating). The inner edge of the shanks of the rails between the balls and the flanges are some distance apart, just above the flanges of the rails, that come out like that (indicating). This guard raid is bent in and sticks in upon the track. I could not very well tell you how longs the wings at the end of the guard rail are; I have seen some that wasn't more than that long (indicating) and I have seen others that is that long (indicating). They vary in length. The guard rail and the other rail sets side by side with flanges at the bottom and the balls at the top, the inner edge or middle being some little distance apart, wide enough to get my foot in easy enough. My foot would go down between the ball and the top only at the end of the guard rail. It would have to go in boot-jack fashion. When I got my foot in there the wheel ran up on my limb, to the knee and tore it off. My limb was cut off about half way between the knee and the hip. I am six foot and a quarter of an inch tall. I earned on an average of about $108 to $120 a month. I have not earned anything since the accident. They took me to St. Bernard's Hospital and my leg was amputated between ten and eleven o'clock or about eleven o'clock the 28th day of last May. That was the day of the accident. The accident happened about ten o'clock at night. We all had lanterns.

Q What did you observe as to whether or not the frogs were or were not blocked?

Mr. Bell: Wait a minute. I object to the question, first, as to its specific application. He does not say where.

Mr. McShane: I mean on the Rock Island Road in these yards.

The Court: Overruled.

To which ruling of the Court, the defendant, by its counsel, then and there duly excepted.

Mr. McShane: (Q) What was the fact, during the time you worked in that yard before this accident, as to whether
47 or not the frogs were or were not blocked?

To the best of my recollection all the frogs were blocked. As to the guard rails they were some of them blocked and some of them were not blocked. There are two wings on a frog that comes out in a point. There is a point comes down this way. Then there are two wings that come out this way (indicating). These wings are supposed to be blocked and in the place it comes to a point is supposed to be blocked. Then there is also the point there is a block made in the frog. The wings spreading out from the frog present the same situation that wings from the guard rail do?

Mr. Bell: I want to present my objection; I object to this line of testimony, your Honor, but I don't want to interrupt each time.

The Court: For the reason indicated?

Mr. Bell; Yes.

The Court: Let the record show overruled and exception.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Mr. McShane: (Q) What kind of blocking was used. Describe that blocking on those frogs and wings of the frogs.

Just a wedge piece of wood drove in there. With that blocking drove in there a man's foot cannot become caught. I don't see any difference towards getting caught between the wing of the frog, and the wing of the guard rail. I don't see that you could get caught in one any easier than you could the other. They are the same distance apart.

I was in the hospital till the 26th day of July. I was then taken home. The car that I could not raise the coupler
48 with a bar was a Minneapolis & St. Louis car, it was marked M. & St. L. I don't know where it runs out of Minneapolis; I know it runs out of St. Louis because I have

of W. seen it. I don't know where it runs in Illinois. I don't know what the other car was. The coupler on the Minneapolis & St. Louis car was a Tower coupler. I think there is an improved Tower and then this old style Tower. This was the old style. If I am right about the two draw-bars the new has got a ball on the draw-bar, that is on that chain, to raise up, when it couples that ball falls down and fills this hole, that fastens that top of the pin. The chain is above this ball. The old draw-bar was just a plain chain reaching from the pin to the lever and that pulled it.

You raise the lever about half way to take the slack out of the chain and all the rest of the way you pull the pin up. I had this lever about half way up; that is, I had all the slack out of the chain, to the best of my knowledge. There is a particular noise by which we can tell whether we have got the pint up or not. You don't have to see, you only have to pull a pin and you can tell by the sound of it whether it is pulled or not pulled if you are experienced. This pin didn't come up; I didn't know what was the matter with it. I had not worked with it before to my knowledge. They were taking it to Englewood; where it was going, I don't know.

I don't know what road it was going to be delivered to at Englewood.

I suffered considerable. My leg is not healed up yet. I have been wearing an artificial leg a little over a month. I have got a strap over each shoulder and one around my waist to hold these straps to place. I use a cane. I can get along without one in the house where there is no rough slipping, but it is very unhandy. It is not healed up yet.

49 The tracks were surfaced nice for the way we were working. The tracks were surfaced up to the top of the ties, with cinders and dirt. It is the left leg that is off, this one (indicating).

Cross-Examination.

I think it was about three months before this accident that I went to work in this yard. It was my custom to go to work at seven o'clock in the evening. Sometimes we worked till 7:30 in the mornings; other times we would get through at six o'clock, depending on the amount of work to do. The three months I was in this yard some of the guard rails were unblocked, some were blocked and some were not blocked. All the frogs were blocked in this yard to the best of my knowl-

edge. I never looked at every one of them. I was around there three months. I was not on duty every night. Some nights I was off. Every Monday night nearly I was off. Generally didn't work Monday night, the engine didn't work Monday night. Most every Monday night we had to be off. I am not sure about all of these frogs now, that is to the best of my knowledge that they were all blocked; I never looked at all of them. Some of the guard rails were not blocked. I do not know how many of them were not blocked. I do not know how many of them were blocked. What I have been telling about guard rails applies to this particular yard where I was hurt. I worked in every yard outside of the yard at Blue Island. They call this yard where I was hurt "A" yard. The other yard down there is "B" yard. A frog is a junction of two rails where two tracks cross. They can put in four blocks in a guard rail, in a frog, where the rails separate this way (indicating) there is a place where they
50 come to a point, they can be put in the block over here (indicating) and then over here (indicating) where there are two tracks the other part of the crossing, the tracks cross here (indicating) and the tracks cross here (indicating) and this point leads out to two wings on each side of this point (indicating) which would be something like this (indicating). I noticed at the time I was hurt that some of these guard rails at this Yard A were unblocked. I first noticed that night that there were unblocked guard rails in that yard,—the night I got hurt, the 28th of May. That is the first night I ever took any particular notice of it. I did not know that night when I went to work that there were any unblocked guard rails in that yard at all. I didn't know that there were any unblocked guard at all there until you got hurt; that is right. That is the first intimation I had that there was an unblocked guard rail in that A yard at South Chicago, when I got my foot caught on that night in it. Prior to that time I thought that all the guard rails at South Chicago were blocked. R. F. Lillis and M. J. Tierney were in my crew that night. Tierney he was down on No. 4, I think we left him where we got this bunch of cars. He wanted to look over them cars and see how many more we had. He was not right there at the accident, no, he was probably a block from there. While he was away I would give signal and Lillis would repeat the signal to the engineer. The engineer could not see me at the time I was hurt. I don't think the engineer could see me when I was giving signals for the cars to go on down the lead, on

of W. account of the cars being on No. 1 in B yard, No. 2 in B yard sticking up close to the lead. B yard is on the same side of the main track as A yard. The engineer was west of the B switch, west of the east end of B yard switch,
51 B yard lead, rather. Lillis was where the engineer could see him. I gave the signal when I threw the switch, No. 2 switch. That switch is on the south side of the main track. At the time I gave that signal I was on the south side of the main track; of the lead track. I don't think the engineer saw me at that time. I don't know. I am not sure. Lillis repeated the sign; I seen him. The cars started ahead and I waked up to tell Lillis where to cut it, or I was going to cut it myself. Either Lillis or myself would cut it; I had the say. In separating cars slack has the effect that it pulls it in and you cannot pull the pin. As to slack in the cars in shoving the cars we ought to be able to pull the pin anywhere. The engineer don't necessarily have to stop for the car to separate, he can slow. If he shoves along the cars won't separate. I didn't give him any sign at all that he could see. After I started to pull that pin I tried to give a sign, but I couldn't give no sign out far enough for my lamp to get out; I tried to shake my lamp. After I found the lever would not pull I went in there to pull the other pin. When I pulled this pin, just as I pulled it, I didn't have any time to give no sign. I didn't give no sign to stop. No, when I pulled the lever and found it wouldn't work I didn't give a sign to the engineer or Lillis to stop the car. I didn't go around on the other side to see if the lever in the other car would work. I said the track was nicely surfaced with cinders up to the level of the ties. It would be smooth walking inside and out. I said that I attempted to lean over as far as I could reach that pin on each of the knuckles between the cars, without getting my feet inside the rails.

Q Was there any particular reason why you could not step over the top of that rail inside to pull a pin between the cars?

52 A I never take no chances getting my feet inside. I did get them inside by slipping. There was no snow on the ground that night.

I worked in the yard at 51st Street. I worked extra, off and on for ever since I have been working until I worked on this job. I worked in the coach yard, yes. I think they have from one to eleven tracks there in one tract and from two to seven in the other yard. I worked in the yard at 47th Street,

at 44th Street, 16th Street, Englewood. All that is right around the City of Chicago. I was not a new man with Tierney's crew that night. I had been working with his crew about two months. I do not know how far car M. & St. L. 9716 moved after it ran over me. I think the door stopped right even. With the doors in the middle of the car it ran about half a car length. All the time I as pulling this lever I was walking along side of the car. I hadn't handled M. & St. L. car 9716 any earlier that evening that I know of. I don't know how long it had been in that yard.

Re-direct Examination.

When an engine is pulling cars the coupling pin cannot be pulled up then. But when an engine is pushing cars then the pin can be pulled up. They don't separate until the engine sort of stops, then they pull apart. When ever an engine is pushing the cars the pin will always come up, if it is all right. By "had the say" I mean that I had a little bit more knowledge about the running of the cars, how fast they should go, and how slow they should go for this end of the yard, on account of Lillis not being working—not being working
53 up there, but that was his first night with us. He was practically a new man in that yard. That is why I went up to see that he cut it off at the right place. The mark was put there by the conductor for either of us, whoever it was, to see it. I have no authority over Mr. Lillis whatever. We both got the same pay. I judge the ordinary car extends out beyond the rail about two feet. I think the standard gauge is 4 feet and 8 inches and some fraction. Draw-bars and couplers are one and the same thing, practically. They are supposed to be in the center of the track. These couplers, where they have knuckles, to uncouple them you open both knuckles and when they come together they come together like your hand. You can open one and that is enough to couple or uncouple the cars. This pin holds them fastened. By raising the pin it is like your hand will open and they will uncouple.

Q. Was it not the regular thing there in that yard when a switchman could not get the coupling open to go in as you did?

M.r Bell: That is objected to.

Mr. McShane: As it now stands, I will not press it, at present.

of
W.

Further Cross-Examination.

I went to work for the Rock Island Railway Company in September, about June 15, what date it was, I don't know. I was not employed by them under the name of Thomas W. Brown. The name I was employed by was Redmond. I worked for them under the name of James A. Redmond all the time while I was in Chicago. I signed James. A. Redmond to the application for employment. This is the application which I signed as Thomas A. Brown.

Mr. Bell: I ask to have this marked for identification as defendant's Exhibit "A".

Said document was thereupon so marked.

54 I could not tell you how many kinds of couplers were in use out there; there are so many kinds. I got hurt with a Tower coupler. There are other kinds in general use. I handled cars containing many other kinds of couplers. The Tower coupler is a coupler by which, when it is standing detached from other cars, you can open the knuckle on the coupler by lifting the lever. You can pull the pin by lifting the lever in a Tower coupler. When you pull that lever sometimes the pin will fall back again unless you hold it. Those couplers work differently at different times. I suppose rust will affect them. Rust or exposure to the weather or a number of things will affect it so that they don't work easy, lots of times they don't work easy. They are liable to be hard to pull at any time. Sometimes they stick so that it will take quite a jerk or wrench. Any coupler that is in actual use by railways, if you get it clogged up with rust or with snow and ice it is liable to pull a little harder. I don't remember whether that lever projected beyond the side of the car or not, the one I tried to pull. Some of them are right on the corner and some of them project beyond the corner and some of them will be six inches inside. It seems so to me that the gauge of the railroad track was 4 feet and a fraction inches. I could not tell you the exact gauge. It is 4 feet, 8 something. That is what the section men say. I judge that the car sticks out two feet over the rail; I never measured one. At the time I was injured I do not know how many cars were coupled to my engine all together. I estimate between 10, 12, 13, somewhere along there. I think it is 12 we had hold of. That is as near as I can remember, somewhere along there. To the best of my knowledge all
55 of the frogs in So. Chicago yard A were blocked. I never examined all of them. I never examined any one in particular, but just passed it over and saw it blocked. I was

under the impression that it was all blocked. I never noticed one that was not blocked. I never paid much attention to what the condition of the frogs and guard rails in any of the other yards I worked at in the terminal division of the Rock Island Company was with reference to being blocked or not. I do not know, I didn't pay much attention to them. I was always under the impression that all the frogs and guard rails were blocked in all the yards I worked at.

Mr. Bell: I move to strike out his impression.

The Court: Strike out the impression. The question is what you saw.

Mr. McShane: I except, your Honor.

The Court: Yes, save your point.

Mr. Bell: (Q) Now, Mr. Brown, I want to ask you whether or not you have a written notice within 30 days after this injury to the claims attorney or the claim agent or the superintendent, setting forth the claim made for this injury?

A In 30 days after I was injured, no sir, I did not. I was in the hospital from the 28th of May to the 26th of July.

Re-direct Examination.

I was interviewed at the hospital by a representative of the company. A gentleman come out and asked me to make a statement, I could not tell you the exact date, two or
56 three weeks, though, after I was hurt. Yes, I know who he was; I don't know his name; I see the gentleman over there now, with glasses on. (Mr. Bell explains that the gentleman referred to is a claim adjuster for the Rock Island Railroad). He copied a report that the other part of the crew made out. They copied that and I read the copy and took the copy and also who signed it, and he took it. There at the hospital. He took a copy and left me a copy of the same report. I think you have got a copy of it here. Yes that is it (taking paper), The other members of the crew made out one just the same as that and signed it. He made out two and left me one and I signed the other for this Rock Island man, within 2 or 3 weeks after I was hurt.

Mr. McShane: I offer that in evidence, your Honor. Well, I ask that that be identified, marked for identification, and later, if it becomes material, I desire to offer it.

Said document was thereupon marked Plaintiff's Exhibit "A" for identification.

This claim adjuster was out there once, after I made that

of W. out, to get that. He was there the first time about a week before that, I think it was. I think the first time he came out was 2 weeks after the accident. A few days later he came back with the statement; I would not say it was a week. I did not see him or any other representative about the case afterwards. I was at the claim agent's office, but I think that was in September; after I got out of the hospital. It was a couple of months, I guess, after I got out of the hospital. When I was able to get out I went down to the claim agent's office. That was before I sued. I talked to them about the case, and I went to your office the same day. I was not at your office before I went there.

57 Mr. Bell: Now, let us stop some where on this. I move to strike out since he began what is said about going to the claim agent's office. Do you want that in the record?

Mr. McShane: I think what he said is competent.

Mr. Bell: I move to exclude it.

Mr. McShane: About his going to my office, I don't care. That may go out.

Q Mr. Brown, what were the circumstances under which you worked under the name of Redmond, instead of your own name?

Mr. Bell: That is objected to as immaterial.

The Court: Overruled.

Mr. McShane: (Q) Go ahead.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

A I was working for the company once before and I was working under my right name as Thomas W. Brown and I got discharged for absenting myself without permission. And it takes so much time to go through writing to these people and get re-instated or get re-employed that the easiest way out of it was to take another name and go ahead and work. And the chances were that they would not let you work for the company again if they knew that I had worked for the company before under the name of Brown. If I had asked them for a job under the name of Brown they would want me to go ahead and get references from the people with whom I had worked. I had worked at Little Rock, Arkansas. There was no snow or ice at the time of the accident. Sometimes when they stand on a sidetrack a bit they get a little bit rusty and hard to pull, but it is never so hard that a man will have

58 to exert himself to pull it. I have seen cars where they would be standing near the water tank that would get

covered with ice that you could not pull the pin, you could not lift the lever at all, where they would be covered with ice, you could not draw the draw-bar. I never saw a pin and coupler that would not raise with as much effort as I made on a pin such as this one on account of rust.

Q Did you ever know of a coupler that was in good repair where the pin would not raise with the force that you applied to the lever on this one?

Mr. Bell: That is objected to "On this one."

The Court: I don't see the materiality.

Mr. McShane: Only, your Honor, that it was not any of the ordinary working couplers. If there was something beyond that, a defect. Some, as he has said, might be a little stiff from a little rust or dirt or something, but nothing like this that with all the heavy efforts he made no amount of dirt or rust could account for.

The Court: You may bring out what he did, his endeavor to get it, bring it out before the jury. If this question is a proper question the defendant would have a right to call different witnesses and go into all the other questions that he tells about.

Mr. McShane: All right, your Honor.

Q In this frog proposition, you said you never noticed any frog or guard rail that was not blocked. What is the fact as to whether in these yards as a rule dirt does or does not accumulate in the throat or the wing of these frogs?

A Yes, I have seen dirt accumulate a little there, so that it would almost cover the guard rail entirely. Unless one takes the time or pains to shove that dirt away they can-
59 not tell whether or not there is a block (dirt) in the frog.

Mr. Bell: That is objected to as immaterial, argumentative.

The Court: I suppose as an elementary proposition, if there was dirt there, he would have to clean it away to see what was underneath.

Mr. McShane: That is what I meant.

The Court: Strike it out.

Mr. McShane: (Q) What is the fact as to whether or not that dirt does accumulate in the wings of these frogs and guard rails, to the extent that it would prevent a man from seeing whether or not there was blocking there or not, unless he shoved away the dirt?

Mr. Bell: Objected to inasmuch as he already said he didn't know anything about it.

of W. The Court: Overruled; save your point.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

A A man could not see the block if it was covered with dirt which very often is the case. It accumulates in any yard, in the wings of the frogs and guard rails. I always had an idea the yard is the least bit down grade, towards the east, the cars seemed to roll better that way. There were two elevators on our line to South Chicago, that the Rock Island takes care of. Taking those cars to the elevators was a considerable part of the work that was done in those yards. These cars come from different roads, and from the west, from Iowa and where they raise wheat, over the Rock Island. Cars delivered to the eastern roads were destined to New York and Pittsburg and other places. We delivered to the Ft. Wayne, Lake Shore and Nickel Plate roads all of which enter Illinois within a few miles of these yards.

60 (It is admitted by defendant that the majority of cars delivered to eastern roads were for points outside of Illinois and that the majority of cars received from Eastern roads came from points east of the Indiana line.)

All of the couplers I have mentioned are of the type that will couple with each other but the particular mechanism is somewhat different. Both the old style and the new style Tower couplers (raise) open the knuckle by raising the lever.

Re-Cross Examination.

The Alton which extends to St. Louis and Kansas City delivers their cars to the Rock Island at 44th Street, I think. The Eastern Illinois at Gresham. I worked for the company at Little Rock in 1900. At the present time my home is there that is my mother is there. My home has been in Chicago for the last five years. I came from Little Rock. The company has a rule that they won't employ a man who has been discharged for disobedience of orders; most of the railroads the same way. It is hard to get a job after you are once discharged.

RICHARD F. LILLIS, called as a witness on behalf of the plaintiff, testified:

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Direct Examination.

I am 23 years old and a switchman. I was a member of Brown's crew the night of the accident. We had 12 cars; Brown was cutting off 4. The engine was on the west end. That was my first night in South Chicago. I had worked for the company two years. I was unfamiliar with that yard until that night. We were going in on No. 2; Brown threw the switch and gave the signal that he was ready for the cars to go ahead. I gave the signal to the engineer. I was
61 between Brown and the engineer right between No. 1 and No. 2. It is about 70 or 75 feet from No. 1 to No. 2 switch. Brown walked towards me, towards the cars, towards the train. I seen him pull the lever, I seen him pull it twice, and after he was out of my sight I know he pulled it twice, once or twice. I saw him pull it twice while he was almost directly opposite me and after he had got a little west of me, I could hear him pull the pin. He was pulling on the lever that lifts the pin. It was on the east end of the car that went over him. They were running towards the southeast. There is a sound by which a man that knows can always tell whether the man gets the pin out. I could tell from the sound it did not get out while I heard him pulling the lever. I do not know how to describe the sound. It is a sort of snap or sharp sound. He had to be part way in between the cars to get this lever that he was pulling. It was on the east end of the car behind him, so he was practically in between them all the time. The lever did not come out beyond the edge of the car. It was inside the end of the car probably four or five inches and he had to extend his hand in that far. After that I seen him lean over. I did not notice where his feet were. The cars were going four or five miles and hour, I should judge, 6 miles, about as fast as a man would walk. I seen him fall and seen his lamp fall. I give the engineer the sign to stop. When the car stopped the center of the car was just over where his lamp was on the rail. The car is about 34 or 36 feet long inside dimensions. One pair of trucks passed over him. The wheels of a truck are about 20 inches or 2 feet apart. I ran to Brown and seen that his leg was cut off. His foot and leg were both in between the rail and the guard rail at the west end of the

of F. guard rail. This guard rail was longer than the ordinary
62 guard rail. It was extra long, probably 10 or 12 feet long. There was a wing on both ends of it, it turned out; bent out like this (indicating). The guard rail was inside the rail of the track. The ball of the guard rail was about an inch and a half from the ball of the rail. Where it flared or turned out it was about three and one-half inches. The rail was the ordinary T rail. The foot was in between the rail and the guard rail and was bent up. The foot was broken up in two and then the leg was along the guard rail. The foot was east of the rest of the leg. I did not take time to get it out. I shoved the rest of the train over to get an empty car to take him to the hospital. We took him to the hospital. I notified his wife and then we went back to work at South Chicago. Mr. Tierney was with me all the time. After we went back we went to this car that he tried to uncouple and both of us treid to cut it with this lever. I tried hard to life the lever, I tried hard, as hard as I could twice. I could not get the pin open. The engine was on the car. We had a slack. The slack did not prevent the pin from raising. I believe Mr. Tierney tried it. We finally made the uncoupling at the other side of the car. I do not remember whether Mr. Tierney or I cut the car. I tried to raise the opposite pin with my fingers and the foreman told me not to, to go to the other side and I do not remember whether I did or he did. The cars were standing still at this time. After the cars had been uncoupled I went behind it while they were moving away from me and tried to raise the pin but could not. You can't open the knuckle without raising the pin. This was a Minneapolis & St. Louis car, M. & St. L. I do not know where it runs. The section man took the foot out of the guard rail by taking up the rail. There was no block in the west end of the guard rail.

63 *Cross-Examination.*

The number of the car is M. & St. L. 9716; loaded for Englewood.

Direct Examination Resumed.

I made an accident report to the company the following morning before we got home from work giving an account of the accident. The conductor likewise sent in a report.

Cross-Examination Resumed.

We are required to make out an accident report every time there is an accident of any kind. When Brown was attempting to lift the lever I was close enough to him to hear the noise that the pin makes. I knew from the sound that the pin had not become undone. I was about five car lengths from the engineer and in sight of him. It was my business to repeat the signal to the engineer. I did not give a sign to stop until after I saw Brown fall. He fell outside the rails and pulled himself away. The engineer stopped his train the minute I gave the sign. He made as quick a stop as I have ever seen. I know nothing about the condition of the guard rails in that yard at the time of the accident, outside of the one I looked at.

Re-direct Examination.

Dirt collects between the wing and the guard rail, in the wing of the guard rail so you can't tell if it is blocked. That happens right along. I am still working for the company. I mean this particular car was loaded for Englewood.

64 MICHAEL J. TIERNEY, called as witness on behalf of the plaintiff, testified:

I am 54 years old and a switchman for the defendant. I was foreman of the crew the night Brown was hurt. We had 12 cars; 8 were to be cut off. We were trying to put 8 in on track No. 2. I was not at the place of the accident when it happened. When I got there I found Mr. Brown out between B yard and A yard with his leg cut off. I do not know the number of the car. It was an M. & St. L. car. He was out from under the car before I got there. I saw him before he was taken to the hospital. I tried to raise the lever on the southeast end or south or west side of that car. I tried it once and could not get the pin up. The cars were finally uncoupled by raising the pin on the other car. I do not remember whether I did that or Lillis.

The M. & St. L. Car was loaded for Englewood. It was a load of grain to be unloaded at Englewood. It came from South Chicago. It was taking a load of grain from South Chicago to Englewood. It was loaded at South Chicago and would be unloaded at Englewood. We had 11 other cars on

of J. that train for the C. & E. I. They were loaded with grain from the South Chicago elevator. We do not switch at the elevator. Grain coming from the west to the elevator goes through South Chicago yard and is taken to the elevator and unloaded. This engine we had was used to handle all kinds of cars. This time it happened to be handling just these cars. I still work for the company. Mr. Lillis and I made an accident report the day of the accident.

Cross-Examination.

The rules require an accident report. The lock pin of this coupler seemed to be rusted in. That was the only defect
65 I could find. The coupler on the adjoining car was all right. It was in good shape. This examination I made was immediately after the accident.

Re-direct Examination.

When Lillis and I went back there we uncoupled these cars by raising the pin on the other car. I examined the coupler right then after the cars were pulled apart. The cars were 25 or 30 feet apart. Nobody else was there by Lillis and myself. I tried to lift the lever but could not lift it, and then I lifted the lock pin at the knuckle. After they were apart I again tried the liver but could not make it. There is a small lock that goes back of the lifting pin that you raise up. You can always open the Tower knuckle that way if you can get the block pin up. It is a small pin on the side of the coupler to lock the coupling pin; a small lock pin on the side of the coupler. You just take this lock pin out. It is a straight pin. I raised that pin up and it released the lock pin. That is the way I got it up. I looked at it and did not see nothing wrong with it. They generally rust right there. I did not see any rust. I do not know whether it was rust or not that made it stick; I saw no rust. In a coupler that is in daily use the pin is raised up and down many times a day. Cars are sometimes stored at elevators. There are 12 tracks in the elevator. Each track holds 12 cars. They are unloaded and loaded at the same place. We delivered cars and took them away from that elevator daily. It takes 40 minutes to unload a car, and about the same to load. Sometimes we are there every hour during the day. I

could not see any rust on the coupler. I do not know about
66 the lock pin; you cannot see the lock pin; it is hidden. It came up when I lifted the other pin. It didn't come up until I lifted the other pin. The exterior appearance of the coupler appeared like all other couplers in use, a little dirty but as though it had been used right along.

Testimo Michae Tiern

Re-Cross Examination.

I saw no other defect in the coupler.

Re-re-direct Examination.

I didn't see the pin at all; I ddin't see the lock; you cannot see it. We supposed that rust was what held it. I did not see anything that made me think it was rust.

And thereupon the plaintiff rested his case.

67 And thereupon the defendant moved the Court to instruct the jury to find a verdict for the defendant, which said motion and instruction are in words and figures as follows, to wit:

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68 IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

State of Illinois } ss.
County of Cook }

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. Law.

MOTION.

And now comes the defendant, The Chicago, Rock Island and Pacific Railway Company, by M. L. Bell, its attorney, at the conclusion of the plaintiff's evidence, and asks the Court to exclude the evidence offered herein, by and on be-

half of the plaintiff, from the consideration of the Jury, and to give to the Jury the following instructions, to-wit:

The Court instructs the Jury to find the defendant not guilty.

M L Bell
Attorney for Defendant.

69 And thereupon, during the argument of said motion, a recess was taken until 2:00 o'clock P. M.

2:00 o'clock P. M., Thursday, January 27, 1910.

Court reconvened after the noon recess.

And thereupon counsel continued the argument on said motion.

Whereupon an adjournment was taken until 10:00 o'clock A. M. to-morrow, Friday, January 28, 1910.

n to in- jury.

70 10:00 A. M., Friday, January 28, 1910.

Court met pursuant to adjournment. Whereupon out of the presence and hearing of the jury the following proceedings were had.

The Court: In this matter of Brown versus the Chicago, Rock Island & Pacific Railway Company, the Employers Liability Act of Congress, in my opinion, cannot, in view of the cases, be held to apply here. A careful study of the opinion and expression of the different writers in the cases of 1907 disposing of the old law leaves no way open for me save a holding against plaintiff's contention. Everything that the majority said, everything that Mr. Justice Moody said, who I think wrote the great opinion of the whole set, the special opinions of Justice Harlan, the special concurring opinion of Justice Peckham and Justice Holmes all point one way, as I read it. Coming to specfic language I will from the majority opinion quote only the following:

"The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a
71 common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact busi-

ness not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute", etc.

Justice Harlan in his opinion dissents from this majority holding, and this language is to be read having in mind the fact that he has in mind the majority language, and it is only because of the language of the majority opinion that he does say it, and having in mind his previous opinion on this general subject, including the securities given, uses this language:

"Mr. Justice McKenna and myself are of opinion that it was within the power of Congress to prescribe as between an interstate commerce carrier and its employes, the rule of liability established by the act of June 11th, 1906. But we do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act reasonably and properly interpreted, applies and should be interpreted as intended by Congress to apply only to cases of interstate commerce and to employes who, at the time of
72 the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred. We concur in the views expressed by Mr. Justice Moody as to the scope and interpretation of the act. We think the act is constitutional, and therefore, that the judgment should be reversed."

Justice Holmes: "I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrases 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows. The statute then will regulate all common carriers while so engaged", etc.

Now, I cannot see that the language these various men have used leaves very much room for a debate as to what they had in mind and what we must assume Congress had in mind when in 1908 Congress used this language:

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"Be it enacted, etc. that when on and after August 1, 1908, any person employed by the United States—" That is the Peckham case. "Be it enacted by the Senate and House
73 of Representatives that every common carrier by railroad, while engaged in interstate commerce between any of the several states or territories or between any of the states and territories or between the District of Columbia and any of the states and territories or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." That leads me, with the language of the Supreme Court in the cases in 1907 on the previous Act, to succeed which this act was passed, and to cure which omissions this act was passed, to the conclusion that Congress intends this Act to mean what the Court in that case said it would have to mean in order to be effective; so that I presume therefore that this Act does not apply to this case, because the Rock Island Road in handling this cae from South Chicago to Englewood was not engaged in interstate commerce in handling that car. It was at that moment engaged in interstate commerce in hauling the Overland Limited from Chicago to Denver. It was engaged in interstate commerce in hauling trainloads of wheat, cattle, corn and grain from the western fields to Chicago and at that instant elsewhere engaged in interstate commerce, but Brown was not injured while employed by the Chicago, Rock Island and Pacific
74 Railway Company on that railroad while that railroad was engaging in interstate commerce.

The Safety Appliance Act, under the ruling of the Court of Appeals in the Wabash case, does apply to this case in my opinion, and contrary to my independent judgment. There is not any room left for me as I read this opinion.

These are the facts by the Court: In the Wabash case the only question is the sufficiency of the petition. The averments in substance were that the Wabash company was an interstate common carrier owning and operating an interstate railroad and engaged in transporting thereover commodities in interstate traffic. That on a day named it hauled on its line of railroad a car that was not equipped with automatic couplers, that the car was one regularly used in interstate traffic, but at the time in question was empty, as against the demurrer to this petition which stands as evidence that

the defective car was not a part of an interstate train, was not itself being moved on an interstate journey and was not exclusively devoted to the carriage of commodities in interstate traffic.

Opinion on motion to instruct

Now the case in question: The evidence shows that this was a Minneapolis and St. Louis car, that is evidence that it is not exclusively used in intra-state traffic. It was off of the Minneapolis and St. Louis Road and a Judge nowadays has a right to know that the Rock Island cars and
75 the Minneapolis and St. Louis cars and the Pennsylvania cars go about with consilderable disposition not to stay at home all the time. They go all over the country, one here, there, elsewhere, and the one there, here, day after day, sometimes being gone a year and sometimes getting off so they cannot be found. It is in this case therefore that this car is a car that is used in interstate commerce, that the place where this happened was along tracks used in connection with an interstate railroad. There is no evidence that the car was in a train that contained a car loaded interstate nor that the train itself was interstate, the transaction itself was entirely intra-state.

Now this is what Judge Baker says in the Wabash case,—as stated before it is opposed to what I have held on a number of cases, but this Court is authorized to prescribe a rule that I must follow.

"Do the words in the second section of the act of 1893, 'any car used in moving interstate traffic', mean that a car is subject to the statute only during the time it is actually employed in moving interstate traffic, or that every car is within the act if it is customarily or repeatedly employed in such movements? Both meanings are within the dictionary definitions of 'used', and, if regard were paid only to the rule that a penal statute should be strictly construed, the narrower meaning might be taken. But a penal statute, or one in derogation of the common law, should not be hedged in to less than the legislative intent if that is clearly revealed by the act as a whole. From the title and from every part of the act we think it is indisputable that the purpose was to
76 promote the safety of interstate passengers and freight and to protect the lives and limbs of railroad employes while engaged in the work of interstate transportation. The risks incurred in coupling and uncoupling are more imminent on switching tracks, where trains are made up and distributed,

n to in- ury.

and where empty cars are set out at freight houses or factory platforms to be loaded, than on the main lines."

Now, that being the holding of the Court of Appeals of this Circuit, I hold that the Federal Safety Appliance Act applies to this state of facts in this case.

That means that the Illinois Employers Liability Law does not apply in this case, as I take it. That is the necessary result of it. It cannot apply if the other applies.

On the question of the negligence of the defendant and the contributory negligence of the plaintiff it has been held in this court on a number of occasions that a car defectively equipped at one end was not equipped in compliance with this statute. They were criminal cases. In those cases it appeared that if the employe had gone over the train or around the train on the other side he could have made the disconnection without going between the tracks, without going between the cars. That would simply leave a color of argument,

color of ground for the argument, that if wherever two
77 cars are coupled the switchmen on either side of those

two cars can disconnect them by the lever, this act is complied with. I don't think that is what it means, so I must hold that it is in this case a violation of the statute if any of these levers provided for the purpose of complying with this Safety Appliance Law do not work, whether the failure to work is due to the absence of a connecting chain or a fracture of some essential part or connection or to a failure to have a safety appliance as expressed yesterday in some case read by the counsel for the plaintiff: To constitute a compliance with this act the appliance not only must be supplied, but it must work, and in this case the evidence is that the plaintiff went between the cars,—that the plaintiff went to this lever and pulled and jerked a number of times and could not get the thing to work. Now, to me in this case that is evidence from which a jury may infer that as to that coupler, that appliance, there was not a compliance with this law. It may have been due to rust, although I have such general observation on the subject that I cannot away from the jury I cannot infer that that sort of thing could happen from rust as a practical proposition.

On the question of the plaintiff's contributory negligence,

the section of the Safety Appliance Law, taking out the
78 assumption of risk, in my judgment does not leave any

contributory negligence. It is true, as counsel for the

defendant says,—I mean as a matter of law here, as counsel for the defendant urges, this man could have gone across the track, around the train, over the cars, or he could in some way have gotten a signal to somebody on the other side, and he could have gone to the side of the cars opposite from where he was or somebody else could and by using the lever there this disconnection could have been effected without anybody going between the rails. In considering whether his failure to take the steps to bring about that situation is to be regarded as contributory negligence, I think it is fair that we should all have in mind the practical condition of affairs in doing this work, which we know to be—that in all railroad yards—this is a matter, I assume it is a matter of observation on the part of my brethren who have to deal with these subjects, about the last thing that men engaged in this kind of work now or heretofore pay much attention to is the question of keeping out of frogs or keeping heads away from drawbars. It is a business the conduct of which seems for some reason to breed disregard for personal safety, so that as men go about these yards the thing uppermost in their minds is to get the thing done and accordingly they are on the jump
and on the run, here, there and elsewhere, hanging on to
79 stirrups, jumping on to footboards, hanging on wherever
they can get a grip, going in between cars, making couplings where levers don't work, and it is my personal observation, which has nothing to do with this determination, but which I see frequently as I stand on the platform waiting for my train at 57th street, too many of these safety appliances don't work. If it was known and understood generally the extent to which these things don't work you would hear more of it than you do now. Now, that being true, I don't see how it can be held as a matter of law contributory negligence where it is a matter of common knowledge that that is the way the business is done, that if the thing don't work the man doesn't take the time to stop the train and go under the cars, or go around or go over the cars and down on the other side, which we all know would be a serious interference with the conduct of the business of the employer and probably not tolerated. I don't see how it can be regarded as contributory negligence as a matter of law.

On the question of the charge that this defendant did not have knowledge—on the question of the claim that there is no evidence that guard rails were blocked, and therefore it

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ry.

is not for the jury to hold that in this case the fact that this guard rail was unblocked is evidence of negligence I have only this to say: A frog and a guard rail are pretty much the same thing. I think it is fair to infer or conclude or hold
80 that the employe would be justified in concluding or assuming, and I have in mind the fact that he was there for a time long enough to see, in assuming or presuming from the fact that frogs were blocked, that things in that yard of that character were blocked, and therefore that the fact that the defendant had blocked its frogs created a situation where under the circumstances of this case, on that phase of it, it is for the jury to say whether the defendant was negligent in not blocking this guard rail.

On the question of the failure of the plaintiff's proof to show that there was such a failure or absence of blocking here for a period of time which gives the defendant notice, there is this to be said in that connection: The plaintiff's prof is there was an accumulation of dirt at this guard rail.

Mr. Bell: Not at this particular one, at some, he said.

Mr. McShane: Generally, there was generally.

The Court: Well, he talked about an accumulation of dirt at various places, and I thought he said at this guard rail, but whether that may be so or not, there is evidence here as to an accumulation of dirt at guard rails. The mere fact of accumulation of dirt at guard rails is evidence that time has elapsed since there was a block there. If that condition existed at other guard rails in this yard of course the
81 defendant is chargeable with notice of that fact, and if it had notice that other guard rails had lost their blockings long enough for dirt to accumulate there, it would be for the jury to say if that was not information for the defendant to put it on inquiry respecting the guard rails in the yard.

The motion is overruled. The Employers Liability Law is out. Bring in the jury, save your point.

Mr. McShane: Instead of coming up here afterwards I desire to and do except to the ruling of the Court holding that the Employers Liability Law does not apply and that the Illinois Safety Appliance does not, and insist that that ought to be a question for the jury. I think while it is a question for the jury as to which law applies there is not any question about what the result ought to be, but I except to the Court's ruling that the Employers Liability Act does not apply.

The Court: Each of you make such exceptions as you want to keep.

Mr. Bell: This leaves in the case only the Safety Appliance Act, in which there is nothing said as to the blocking. The only charge there is a violation—

The Court: The common law count.

Mr. Bell: It leaves the common law count, under which there is no negligence in the coupler. As to the unblocked
82 guard rails we expect to meet that with proof, your Honor will understand, and we do not accept this ruling as final for the purposes of this case, until you have heard that proof.

And thereupon the defendant, by its counsel, duly excepted to the ruling of the Court in holding that the Federal Safety Appliance Act applies, and also duly excepted to the ruling of the Court in holding that there is evidence of negligence under the fourth count of the declaration; also duly excepted to the ruling of the Court in holding that the question of plaintiff's contributory negligence should be submitted to the jury.

And thereupon the jury returned to their seats in the court room.

Mr. McShane: Mr. Bell, you and I since adjournment have learned about just where this Minneapolis and St. Louis Road runs: It runs from Minneapolis to Des Moines, Iowa, and out into North Dakota and does not come in Illinois. Is that right?

Mr. Bell: That is my understanding, Mr. McShane.

And thereupon the defendant, to maintain the issues on its part, introduced in evidence the following testimony, that is to say:

Mr. Bell: The defendant desires to offer in evidence to the jury, the application for employment heretofore submit-
83 ted to the plaintiff and identified by him and marked for identification Defendant's Exhibit "A".

Mr. McShane: I object to it on the ground of its immateriality, your Honor. The Employers Liability Law nullifies things of that kind. It says that no contract or rule or regulation shall be binding that tends to relieve the employer from the performance of the duty imposed by the statute.

The Court: Is this offered as a release?

Mr. Bell: No sir.

The Court: Contract of release?

Mr. Bell: No sir.

Mr. McShane: Do you want to read it all?

Mr. Bell: I want to read it all.

Mr. McShane: I want to make that objection.

The Court: I don't know,—the Employers Liability Act is out of the case.

Mr. McShane: I want to save my point.

The Court: Of course I will overrule your Objection. Is there anything else?

Mr. McShane: That is all just now, your Honor.

The Court: Very well. Overruled. You don't need to unless you have a particular reason for it read it now. You can read it in the argument.

84 Mr. Bell: I prefer to read it now.

The Court: Very well.

Said document was thereupon marked Defendant's Exhibit "A", and was read to the jury by counsel for the defendant, in words and figures following, to wit:

85 DEFENDANT'S EX. A.

10-11-05 5M Form 583.

Application for Employment
To The
C. R. I. & P. Ry. Company.
(Write or stamp name of company in full)

Burr Oak Station, Sept 11 1907

Instructions.

All applications for employment as agents, operators, station, baggagemen, enginemen, firemen, engine hostlers, engine dispatchers, conductors, flagmen, brakemen, train baggagemen, train porters, yardmasters, assistant yardmasters, yard foremen, switch foremen, switchmen, switch tenders, signal men, tower men, yard flagmen, bridge tenders, flagmen, gatemen, section foremen, railroad crossing flagmen, bridge foremen, watchmen, and such other employes as may be designated by the General Superintendent or Superintendent Machinery, must be made by the applicant himself, in duplicate, on this blank. The applicant will then report to the Company's surgeon to have his sight and hearing tested, and when position applied for is in the engine, train or switching service, for a physical examination also. Surgeons making such tests and examinations will report result of same in proper place on this blank, sending one report to the Division Superintendent

or Superintendent Machinery, and the other to the Chief Surgeon.

A fee of $1.00 will be charged for making such examinations, and the same must be paid by the applicant at the time of the examination.

All persons engaging in the service of this Company in a capacity in any way connected with the Transportation Department are hereby instructed and notified that they must not enter upon their duties until they have first read and fully understood all the General Rules and Regulations in the book of Rules and Regulations, Operating Department, and the special rules attached to the current time table.

No one need apply for employment who is not able to read and write English, and cannot produce a certificate of good character from his last employer.

To H. P. Justin,

G. Y. M.

I hereby apply for a situation as switchman, or any such other service or employment as may be necessary or required from time to time by the Company, or my superior officers, and if accepted agree to observe all rules and regulations of the Company.

1. My name in full is James Arthur Redmond

2. When born Aug 27 1874. Where born Bakersfield 86 Weight 195 Height 6 ft Complexion dark Color hair dark Color eyes dark.

3. Name of wife, if living (if unmarried, so state) not married

Residence .....
(City, Street and Number)

4. Names of father and mother, if living Dead

Residence .....
(City, Street and Number)

5. If no family or parents living, name and address of nearest relative M. Redmond Bro Bakersfield, Cal

6. Names and addresses of all persons, if any, dependent upon you for support, or to whose support you are contributing, with their relationship, if any none

7. Where and how long have you attended school? Bakersfield, Cal about 8 years

8. Do you smoke cigarettes? No

9. Do you use intoxicating liquors? No

10. By whom are you employed at present? No one No.

..... Street ..... Town or City.....
State of ..... In what capacity are you employed?.....

11. Occupation previous to engaging in railway service Painter.

12. State what railroad experience you have had, giving names of roads, in what capacity employed, length of service on each road. If you have not previously been employed by a railroad company, state by whom and when and where you were employed. (Applicant must here give his history for the last five years, beginning with his position of five years ago, and giving each year in regular order down to date.)

Name of Railroad or other Employer	Town or City at which Employed.	Name of State.	Name and Present Address of Employer.	What was your Occupation?	Date you entered their service.	Date you left their service.
S. P.....	Bakersfield...	Cal.	D. Burkholder Bakersfield, Cal.....	Switchman	Aug. 7 1897	Jan. 10 1904
Big Four.....	St.Louis	Mo.	Bridges, St. Louis, Mo.	"	Mar. 18 1904	Aug. 1905
Belt R. R....	Chicago.	Ill.	Stevens Chicago, Ill.	"	Nov. 8 1905	April 22 1906
C. B. & Q....	Chicago.	Ill.	Kirby Chicago, Ill.	"	May 11 06	Sept. 5 07

87 13. Cause of leaving last situation (explain fully) resigned on accont otending sickness

14. If you have ever been in the service of this Company, state what length of time, in what capacity, where, when and why you left it I never was employed by this Company.

15. Have you ever been discharged or suspended from any situation? If so, state particulars, when and where never was

16. Have you now or did you ever have any litigation with any railroad company? If so, give name of each company and date and place of such litigation never did

17. Have you ever been injured? If so, when no Where

Defen Ex.

..... How ..... and extent of injuries .....

18. Have you any physical ailments or defects, such as lameness no deafness no, color-blindness no or short-sightedness no (Each question should be specifically answered.)

19. Have you ever before made application for employment, and been subjected to a physical examination? If so, state in each case when, where and by what physician examination was made, and whether you were accepted or rejected C B & Q R R physician May 11 06 accepted

20. Following are the names and residences of three responsible persons who will certify to my good character:

E. Gadwood, Bakersfield, Cal.

J. A. Bennette, Cedar Rapids, Iowa

Wm. Coupper, 4167 Emerald Ave. Chicago, Ill.

In consideration of my employment by said Company, I further agree that whenever I shall sustain any personal injury while in the service of said Company, either upon lines of road operated by it, or by any company with which it shall have train, track or running arrangements, or while in the service of any company with which it shall be united in a so-called railway system, I will allow the surgeons of the Company
88 in whose service I may so be, and any medical examiners selected by it, to examine my person and body as often as the Company may deem necessary; and, in the event of any suit or action against any of such companies for injuries received, or for death resulting therefrom, I hereby agree, in consideration of my said employment, that any surgeon, physician or medical examiner, who may have attended or examined me while in the employ of any of the aforesaid companies, or at any time prior or subsequent thereto, may testify as to all facts in his knowledge, whether derived from the confidential relation of physician and patient or not, and I hereby waive all objections to any such surgeon, physician or medical examiner so testifying whenever called upon by any of the aforesaid companies, and further agree that refusal to allow any such examination to be made, or such testimony to be given, shall be a bar to the institution or prosecution of any action on account of such injuries, and any such action pending at the time of such refusal shall at once abate in consequence thereof.

In further consideration of such employment, I agree that if, while in the service of said Company, I sustain any personal injury for which I shall or may make claim against the Com-

pany for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a Superintendent, Claims Attorney or Claim Agent of said Company, which notice shall state the time, place, manner and cause of my being injured and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated; and my failure to give written notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries.

If, however, the laws of the state or territory within which such injury may be sustained shall require the giving of notice of injury, then such notice shall comply with such requirements. If the laws of the state or territory within which such injury may be sustained provide that a contract or agreement for the giving of such notice, within less than a stated period, shall be void, then the applicant agrees to give notice of injury within the minimum period designated in such act or acts, and as provided therein; if no provision be therein made, then such notice to be given as provided herein.

In further consideration of such employment, I hereby authorize this Company and its officers, and the officers of any other company or firm by which I have been heretofore employed, to answer any or all inquiries as to my conduct and qualifications while in such service, and, so far as they may know, the cause of my leaving the same.

I further agree that if under my employment I shall be called upon to work or run on the lines of any company with which the employing Company shall have train, traffic or running arrangements, or if I shall be called upon to work or run on any line or road with which it shall be united in a so-called railway system, all the conditions, obligations and provisions of this instrument shall be held to be for the benefit of, and to have the same force and effect as if made directly with such other company, line or road; and in case of injury on such other line or road or part of such system, I agree to give the notice hereinbefore provided for to a Superintendent thereof, and also to the Claims Attorney or Claim Agent of the employing company, or as may otherwise be provided by law.

In consideration of such employment, I further agree that the aforesaid provisions respecting medical examinations,
89 the waiver as to giving of testimony by surgeons, physicians or medical examiners, and the giving of notice of personal injuries shall be binding upon my assigns, heirs, administrators and executors, as well as upon myself.

Defend Ex.

I hereby solemnly swear to the truth of all the statements in this application contained, and, in hereby applying for a situation as aforesaid in the service of the above named Company, I agree that the same, and the agreements on my part herein contained, shall enter into and be part of any contract of employment made with me by the said Company, and if my application be accepted agree to pay all of my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the General and Special Rules and Regulations of the department of service in which I may be employed, together with such amendments thereto as may hereafter be made, to faithfully observe the same, and to perform my duties to the best of my ability and when I leave the service from any cause, voluntarily or otherwise, I agree that all board bills I owe shall be deducted from wages due me.

I hereby authorize said Company, whenever there shall be in existence an employes' hospital fund or hospital association applicable to the service in which I am engaged, to make monthly deductions from my wages in accordance with such uniform schedule as may be current, and to pay the same to said fund or association; and if I am accepted as an employe, I authorize the deduction, from the first wages earned, of the sum of $1.00 to cover medical examination fee.

I have had explained to me the dangerous nature of the service in which I am about to engage. I understand that standing in front of, or getting onto, an engine or car coming towards me is dangerous, and is in violation of the rules, and if done by me will be at my own risk. I understand that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high covered car; that it is dangerous to climb up and down the sides of cars, or to otherwise expose myself, while passing water tank spouts, sand house pipes, coal houses or chutes, seed houses, cotton platforms, signal posts, switch stands, mail cranes, roundhouse doors, buildings, and other structures dangerously near to the track, as they will not clear a man with safety, and that I am required to look out for them and avoid danger. I understand that the duties of the aforesaid situation expose me to great danger, the risk of which I assume, and agree to use constant and proper care to prevent injury to myself and others.

Should I enter the service, pending the approval of my ap-

plication, and it be not approved, I agree, on summary removal, to make no complaint and further agree that the provisions of this application shall apply to such temporary employment.

(Sign here) J. A. REDMOND
Applicant

My present address is 4167 Emerald Ave. Chicago, Ill.
Witness:
D. BARGE
Dated at B Oak this 11 day of Sept 1907.
Applicant approved for employment as .....
....., 19....

Note—This application must be filled out by applicant in presence of and witnessed by the head of the department (or his deputy) in which the applicant is to be employed.

90 Mr. McShane: Since I have heard the document read I want to make a further objection besides the objection that I have stated, because I did not know the contents. I now object to it because on its face and what he has read shows that it is immaterial and irrelevant and I only ask that he introduce so much of it as the Court may hold is relevant to the issues here.

The Court: Save your point.

Mr. McShane: Exception.

91 PAUL KUTSCHE, a witness called on behalf of defendant, testified as follows:

Direct Examination.

My name is Paul Kutsche; am an engineer; have worked for The Chicago Rock Island and Pacific Railway Company 15 years. Was a member of the crew the night Mr. Brown was hurt. I was the engineer. John Walsh was my partner. He is here today. There were 12 cars attached to the engine that night. Mr. Lillas gave the signal to go ahead that night. I did not see Mr. Brown's lantern at the time he was between the cars. I seen it fall at the time of the accident. That was the first time I noticed it. I was then about two car lengths or two and one-half car lengths west of switch No. 1 in yard A—the west end of yard A. I stopped when I saw the lantern fall. That was before I got the signal from Lillas. I think the train moved about a half car length after I first saw the lantern.

No cross examination.

LOUIS WISENER, a witness called on behalf of defendant, testified as follows:

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Direct Examination.

My name is Louis Wisener; am a car inspector; work for The Chicago, Rock Island and Pacific Railway Company; have worked for that Company four years at 44th Street, Chicago. I inspect cars and take a record of the defects, mark bad orders to the shop. Inspect all cars coming from foreign roads in transfer. We make a very good inspection thereof.

Objection.

Mr. Bell: (Q) Don't tell them very good; what do you do?

A. We inspect the cars and take a record of all the defects. I make a record of the cars which I inspect, on the day I make inspection. I have a record of the cars which I inspect, on the day I make inspection. I have a record of cars which I inspected on May 26, 1909. From my record I find that on May 26, 1909, I inspected M. & St. L. car No. 9716.

92 Mr. Bell: (Q) State what if any defects you found in that car?

Objection.

The Court: (Q) Did you keep this record?

A. Yes, and it is sent into the office every day.

Q. Did you write it down?

A. Yes. We write it down the day we inspect. I wrote this May 26.

Q. How are you able to answer this, from what you see form the record?

A. From the record. Entirely from what I see here. Aside from that I have no recollection.

The Court: Read the question.

Q. State what if any defects you found in that car.

A. I can only state according to the record of the book. In cases if this book where there are no defects put down opposite a car, it denotes that the car is O. K. I can tell from this book the road the car come from. This car came from the C. & A.

Counsel for plaintiff permits the reading of the entry in said book under date of May 26, as to said car, which is as follows: "C. & A., May 26, 9716, M. & St. L."

Cross-Examination.

I never would have known that I saw a car of this kind had it not been for the entry in this book. There are two inspectors. One goes on each side of the car. We do not uncouple the cars. We go along and make a note as far as we can see. We do not always raise the coupling pin, as a rule we don't, only once in a while we do. As we go along we cannot see what the condition of the pins inside of the coupler.

Re-direct Examination.

I am not in the habit of lifting the lever at all, that is, I do not raise the pin. If a chain is broken I find it. So far as I can see I find any defect in the coupler.

JOHN F. BRADY, a witness called on behalf of the defendant, testified as follows:

Direct Examination.

My name is John F. Brady. I am section foreman, 93 working for The Chicago, Rock Island and Pacific Railway Company; I have worked for the Company now going on 28 years, since 1882. I work at South Chicago. My territory covers from Stony Island Avenue east to the Illinois Steel Company's gate South Chicago. Have worked at South Chicago since 1882. I look after the maintenance of the roadway on Section No. 4. In May 1909 only a part of the guard rails in the South Chicago Yard A were blocked. Not many were blocked. The standard guard rails were blocked on one side where the new guard rails were put in, but they were not put in the old guard rails; the four and a quarter guard rails were not blocked, meaning sixty pound rail. The other rails were seventy pound rails. The guard rails of the latter were blocked, but the running rails were not. I have a memorandum enabling me to give the correct situation. I have here a carbon copy.

Q. Will you give to the jury the correct situation as to what was the blocking in South Chicago yard A of frogs and guard rails in May, 1909?

Mr. McShane. I object, your Honor, unless—

The Court: (Q) Did you make it?

A. Yes.
Mr. McShane: (Q) When?
Mr. Bell: May 29.
A. Well, I have got a copy.

Cross-Examination.

I made this paper I have in my hand the date which is on it at the request of someone. I was asked to make an estimate of guard rails blocked and guard rails not blocked and I wrote that down. I made this July 8, 1909. I cannot make as good an estimate now as then; my memory does not carry me back that far. I do not remember about the different kinds of frogs nor the different kinds of guard rails; we have four or five kinds there.

Q. By reading that you can recall it, can you?
Mr. Bell: I object to this.

94 The Court: It comes to the question of the right of the witness to testify to the contents of a paper.

Mr. Bell. He has not attempted to yet.

The Court. I assume that that was why you gave him the paper. I didn't suppose you were giving him something that you didn't intend to use in this lawsuit. That was your purpose.

Mr. Bell. It may develop that he has had such a memory that he may remember he was there that night.

The Court: He has stated that he didn't have, that he made an estimate and then you gave him the paper. I assume that the function of that process when you gave him the paper was to get him to give to the jury what is in that paper. Am I right in that assumption?

Mr. Bell. I guess you are substantially right.

The Court: (Q) What is the date of the paper now?

A. July 8.

Q. And this is the original.

A. This as a carbon copy.

Mr. Bell: Here is the original.

The Court. What was the date of the accident?

Mr. Bell. May 26, 1909.

The Court. Well this does not refresh his memory as to the condition.

Mr. McShane. Maybe if I can without prejudice look at that paper, maybe I will not object to it. I will not take it and be bound by calling for it.

Mr. Bell. I don't want to put it in evidence. (Paper handed to Mr. McShane.)

The Court. Or if he knows the condition at the time he made the estimate was the same at the time of the accident, that no guard rail had been blocked since May 26, 1908, and no guard rail had lost its blocking.

Mr. Bell. I don't think that is correct, if your Honor please, because there is a history connected with it which I will get to in a minute; the conditions were changed.

The Court: That takes this estimate out.

Mr. Bell. Yes.

95 I was present the night Brown was hurt, but not when he was hurt. I reached there after the accident. I was familiar at that time with the conditions of the frogs and guard rails in the South Chicago yard. Most of the frogs were blocked, but the four and a quarter guard rails, the 60 pound rails, were not blocked.

Q. Explain why there were some guard rails or frogs in that yard blocked and some not blocked?

A. Well, the guard rails that we made ourselves, what we call home made guard rails, it was not blocked, but the guard rails, the standard guard rails that we got from the company, they were blocked on each end. I could not say for certain, but I think we were about two years getting those standard guard rails from the Company in that shape. Prior to that time the guard rails in that yard were not blocked. There was a time years ago when everywhere in the yard there was single blocking and dirt and everything that could get in got in. Then an order came out to move them all. Under this new order we got these standard frogs. I am not in a position to say what proportion of the guard rails in yard A were blocked and what proportion were not blocked on May 26, 1908. A majority of those guard rails were 60 pound rails under those new blocks. The conditions were the same on the day I made this report as on the day this man got hurt. There had been no change in the guard rails for quite a while. They remained just the same between May 26 and July 8.

Witness thereupon read said report in words and figures following to wit:

"So. Chicago, July 8, 1909. Testi Jon Bra

Mr. Alf. Lepard.
Dear Sir:
Referring to attached would say:
7-8 ft frogs no blocking west end B yard
14 gd rail no blocking # " " " "
5-8 ft frogs no blocking east end B yard
10 gd rails " " " " " "
7-8 ft. frogs " " west " A "
14 gd rails " " " " #" "
8-80# frogs has blocking east " " "
12-80# gd rails has blocking " " " "
8-70# " " has no " " " " "
P. S. All these gd rail without blocking are 4 1/4" rails.

JOHN F. BRADY,
Foreman Sec. D."

96 *Cross-Examination.*

Mr. McShane (Q) What is the date of that, Mr. Brady? A. July 8. Sometimes dirt accumulates at these guard rails; we don't allow cinders or nothing in them. My territory covers Stony Island Avenue to the Illinois Steel Company's gate. I have generally from 10 to 23 section men. Sometimes 10 to 15.

ALFRED LEPARD, a witness called on behalf of defendant, testified as follows: Test Al Le

Direct Examination.

My name is Alfred Lepard. I am roadmaster for the Chicago, Rock Island and Pacific Railway Company. Have worked for that Company 20 years. I have charge of construction and maintenance of property in this territory, tracks, buildings, bridges. My territory is the terminal district; practically from Blue Island to Chicago, in the yards of the properties in Chicago, including the South Chicago Branch, which is not a part of the main line. I am familiar with the practice of the Compayn in regard to blocking within the past ten years. The practice of the Rock Island up to five years ago was to maintain blocking, and then the blocking was all taken out. I was familiar with the condition as to blocking frogs and guard

rails on the Chicago terminal in May, 1909. A part were blocked. The new standard adopted provided for blocking in all frogs and guard rails that were put in after that; this standard had blocking by reason of being furnished with frogs and guard rails. To the best of my recollection the order went into effect about December, 1908, meaning the order to put in blocks.

Cross-Examination.

When I said I was familiar with the practice of this road, including this place, as to frogs in the last ten years, I was coming right up to the present time. I am roadmaster of the whole district. I have a number of section foremen.

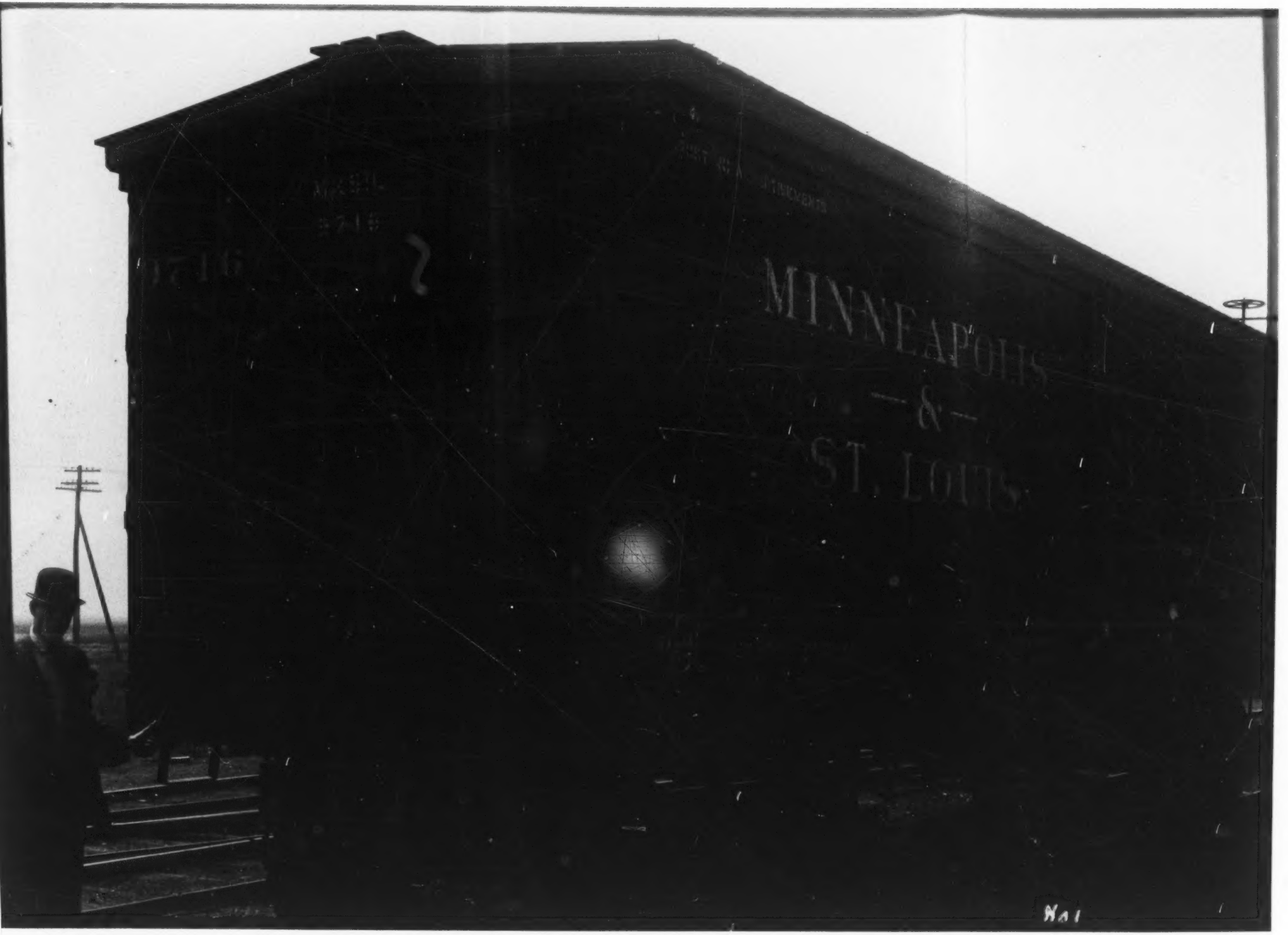
97 LEONARD HUMPHREY, a witness called on behalf of defendant, testified as follows:

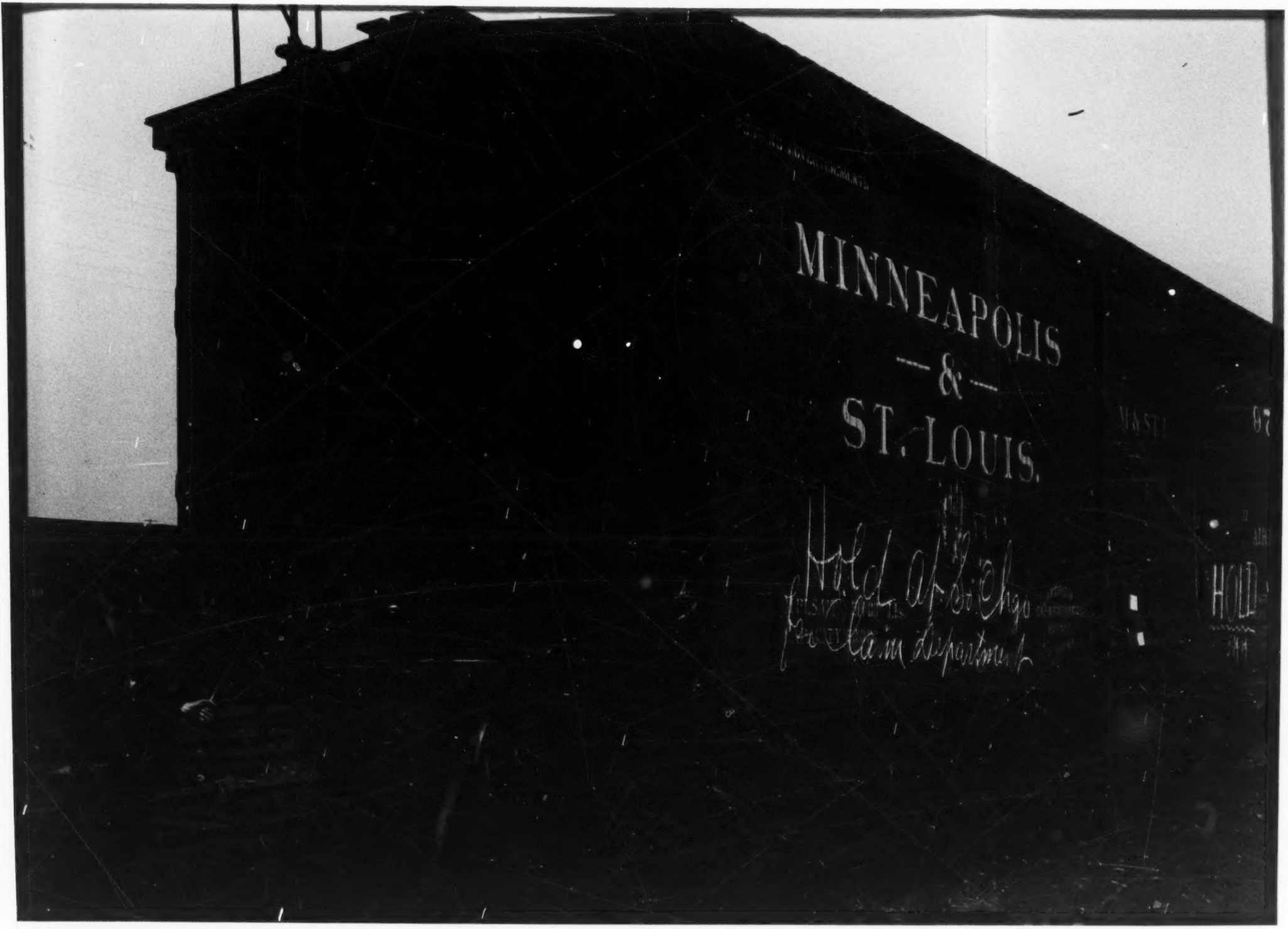
Direct Examination.

My name is Leonard Humphrey. I am a car inspector for The Chicago, Rock Island and Pacific Railway Company. Have worked for the Company two years; was working last May. I made an inspection on the 29th day of last May of car M. & St. L. 9716 and found no defects on the car. I inspected the couplers; they were Tower couplers. I attempted to work the pin or raise the lever; I worked the pin all right. I don't remember which end of the car; it was the east end of the car at that time. I tried both levers and could work them. Witness shown photographs and stated they correctly represent the car at the time inspection was made. Witness looks at photograph and states it is a good picture of car at time of inspection, and that the picture of the person standing by the car is himself.

Mr. Bell: I just want this your Honor to show the general build of the car. Said photographs were thereupon introduced in evidence and marked defendant's Exhibits "D", "E" and "F".

9716
MINNEAPOLIS
—&—
ST. LOUIS.
M & ST. L.
AIR BRAKE
HOLD
LENGTH 34-0
WIDTH 8-3 INSIDE
HEIGHT 7-1
5-14-09


MINNEAPOLIS
—&—
ST. LOUIS


MINNEAPOLIS
— & —
ST. LOUIS.
HOLD

Cross-Examination.

It was day time when I was there on the 29th. It was about 8 o'clock when I worked this lever. No one was with me. They called to get the picture a day or so after. When I up there the first day alone about 8 o'clock in the morning, I gave the lever a turn or two and she came up. That is all I did. I made an inspection of the car. As regards the coupler, I pulled the lever and the pin came up. That is all I did with the coupler. It looked like a car that was in general use as to rust on the coupler. It was just like an ordinary car. I pulled the lever on both ends. I said on direct examination that "I don't remember which end of the car" because the car had A and B ends and I did not know which it was at that time.

Q. You said you gave it on both ends?

101 A. Yes, sir. Gave it as much on one end as the other. I know which end was involved in the accident. One of the yard clerks told me. You can take a pin out and put another in in about five minutes. It is very simple to unhook it and put another in. I don't know how long the pin that was in there had been there. All I know is that I went up and gave the handle a couple of turns and she came up; that is all.

And thereupon the defendant rested its case.

The foregoing was all of the testimony offered or introduced in evidence by either party on the trial of the above entitled cause.

And thereupon the defendant, by its counsel, renewed its motion heretofore made at the conclusion of the plaintiff's evidence to instruct the jury to find the defendant not guilty, and filed its motion and instructions as follows:

102 IN THE CIRCUIT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

State of Illinois
County of Cook } ss.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. Law.

MOTION.

And now comes the defendant, The Chicago, Rock Island and Pacific Railway Company, by M. L. Bell, its attorney, after the conclusion of all the evidence and before the arguments of counsel are commenced, and moves the Court to exclude the evidence offered herein, by and on behalf of the plaintiff, from the consideration of the Jury, and to give to the Jury the following instructions, to-wit:

The Court instructs the Jury to find the defendant not guilty.

M. L. BELL
Attorney for Defendant.

103 The points urged in support of said motion were as follows:

1. There was no evidence tending to show negligence on the part of the defendant.
2. There was no evidence of a violation by the defendant of the Federal Safety Appliance Act.
3. The plaintiff was guilty of contributory negligence.
4. The plaintiff was chargeable, as a matter of law, with the assumption of the risk of the unblocked condition of the defendant's guard rail.
5. The evidence showed that the unblocked condition of the defendant's guard rail was not the proximate cause of plaintiff's injury.
6. The evidence showed that the condition of the coupler on car M. & St. L. 9716 was not the proximate cause of the plaintiff's injuries.
7. The Federal Safety Appliance Act as applied by the

Court to car M. & St. L. 9716, under the facts in this case, is unconstitutional. Renew defe mot stru

8. The action of the plaintiff is barred because of his failure to give the defendant the notice of his injuries required by his application for employment.

9. Plaintiff's contract of employment was induced by fraud and deceit upon his part and was therefore void; it being a continuing fraud, plaintiff never occupied the relation of employe to the defendant and the relation of master and servant did not exist between the defendant and the plaintiff; plaintiff was therefore a trespasser, or at most a bare licensee, upon the defendant's property, and was entitled only to the protection which the law affords such.

But the Court overruled the said motion and refused to give to the jury said instruction, which action of the Court in overruling said motion and refusing to instruct the jury to find the defendant not guilty the defendant, by its coun-
104 sel, then and there duly excepted.

Mr. McShane: I ask that the Court submit the third count to the jury and instruct the jury that if there was negligence upon the part of the company in failing to keep this guard rail blocked that the question of assumed risk is not involved in the case; that the plaintiff did not assume the risk even though he knew or might have known that the guard rail was unblocked. I ask that by reason of the Federal Liaiblity Law.

The Court: Save your point. Bring in the jury.

To which ruling of the Court plainitff's counsel duly excepted.

Mr. Bell: I have one more motion.

The Court: What is your motion?

Mr. Bell: My motion is to direct the jury to find a verdict for the defendant as to the third count of the declaration and to remand the cause to the state court.

Which said motion was overruled by the Court, to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And thereupon counsel for the respective parties argued the said cause to the jury.

And thereupon the defendant submitted to the Court a motion to charge the jury as to the law in accordance with certain suggestions made by the defendant, which said motion and the suggestions therein contained were as follows:

105 United States of America
Northern District of Illinois } ss.
Eastern Division at Chicago

IN THE UNITED STATES CIRCUIT COURT.

Thomas W. Brown
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. 29780.

MOTION.

And now comes the defendant, The Chicago, Rock Island and Pacific Railway Company, by M. L. Bell, its attorney, and moves the Court to charge the Jury as to the law in the said case in accordance with certain suggestions made by the defendant herein, which are hereby submitted to the Court in writing.

M L BELL
Attorney for Defendant.

106 The Court instructs the Jury to disregard the first count of the declaration.

107 The Court instructs the Jury to disregard the fourth count of the declaration.

108 No amount of negligence on the part of the defendant would excuse the plaintiff from exercising ordinary care for his own safety. Ordinary care means that degree of care which a reasonably prudent person would exercise under the same circumstances and conditions. The care which the law requires of any employe of a railway company varies with the dangers of his situation, and in determining whether or not the plaintiff took ordinary care, you should take into account the dangers of his situation as he knew them at the time of his injury, or as he might have known them if he had exercised ordinary care to familiarize himself with them.

109 The Court instructs the Jury as to the first, second and fourth counts of the declaration that if you believe from the evidence that the plaintiff was guilty of any negligence whatever, or in any manner contributed to his injury, then plaintiff cannot recover and your verdict should be for defendant.

110 The Court instructs the Jury that the defendant, in constructing its switch yards, had a right to construct its

frogs and guard rails in any way it saw fit, provided they were reasonably safe for the use of its employes who were required to use them. The defendant in this case was not negligent in leaving its guard rails unblocked. Defend moti stru

111 The Court instructs the July that there is no evidence in this case that the defendant had violated the Federal Safety Appliance Act.

112 An employe assumes the risk of all the dangers in his employment which are known to him, or which could be known to him by the exercise of ordinary care on his part. Thus, in this case, if the plaintiff knew, or by the exercise of ordinary care on his part, could have known, that any of the guard rails in the yard of the defendant in which he was employed to work were unblocked, then by continuing in the employ of the defendant he took upon himself the danger resulting from such condition of the guard rails.

113 The Court instructs you that the act of Congress which requires railroad companies engaged in interstate commerce to equip their cars with automatic couplers imposes upon railway employes the duty to refrain from going between moving cars to couple or uncouple them.

114 If you believe from the evidence that the plaintiff entered into a contract with the defendant that he would, in case he received an injury, give notice in writing of such claims to the superintendent, claims attorney or claim agent of said company, within thirty days after receiving such injury, which notice should state the time, place, manner and cause of the injury, and the nature and extent of same, and the claim made therefor, and if that said contract provided that the failure to give such notice should be a bar to the institution of any suit on account of said injuries; and if you further find that the plaintiff has failed to give such notice, then your verdict in this case should be for the defendant.

115 The Court instructs you that if you believe from the evidence that the plaintiff obtained his employment by fraud or deceit upon his part, and that but for such fraud or deceit would not have been in the employ of the defendant, then your verdict should be for the defendant.

116 And before said case was argued, plaintiff's counsel tendered to the Court the three special interrogatories, hereinafter referred to, with a request that they be submitted to the jury to be answered, and at the same time he gave the defendant counsel a copy of each of said interrogatories.

And thereupon, the case was argued by the counsel for the

o In- ury. respective parties, and during the argument of plaintiff's counsel he stated to the jury that one section of the United State Safety Appliance Act provided:

"That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

And he claimed that the car in question was hauled or used by the defendant in moving interstate traffic contrary to the provisions of said act.

jury. 117 And thereupon at the conclusion of the said arguments the Court charged the jury as follows, to wit:

Gentlemen of the Jury: In this case the plaintiff seeks to recover from the defendant damages for a personal injury claimed by the plaintiff to have been sustained by him while in the employ of the defendant as a switchman, in the defendant's yard at South Chicago. There are two counts in the declaration setting forth the plaintiff's claim, the declaration being the written statement in formal legal verbiage of the plaintiff's claim.

The first count charges in substance that while he was in the defendant's employ, the defendant being at that time a common carrier by railroad, the defendant moved a car or permitted a car to be moved over its tracks, which car was used in interstate commerce. That under the law that car was required by the defendant to be equipped with such a coupling device as that it could be operated by the plaintiff without the plaintiff going between the ends of the car. That

the defendant failed to so equip the car, and that while
118 the plaintiff in the discharge of his duty as a switchman in its employ was endeavoring to effect an uncoupling of the car from the one next to it he suffered the injury which has been testified about in this case, his averment in that respect being that at the time of the injury he was in the exercise of ordinary care for his own safety. This first count charging the failure I have just referred to is based upon the Act of Congress imposing certain requirements upon common carriers engaged in interstate commerce, and this statute provides that a carrier so engaged shall not move or permit to be moved on its rails a car that is used in interstate commerce unless so equipped. This Act also provides that if

an employe engaged in the service of such carrier sustains Charge
an injury by reason of the carrier's failure to obey that law, the employe shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still this first count, that if the employe goes between the cars to effect an uncoupling he is not chargeable with contributory negligence, that is a failure to exercise ordinary care for his own safety by the mere fact of going in between the cars to effect the uncoupling, but he is required before he can recover to exercise ordinary care for his own safety after he goes
119 between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars.

So on this first count if you find that the defendant company was a carrier engaged in interstate commerce by railroad, that is, the transportation of property, passengers or freight, between the states, that is, from Illinois to points outside of Illinois, and that the carrier on the occasion in question moved or permitted to be moved a car not equipped as I have indicated to you, the law requires then, I charge you, that such moving or permitting to be moved of the car in question was negligence on the part of the carrier, under the first count. And under that count, if you further find that after the plaintiff went between the cars to endeavor to uncouple them, and while he was there engaged in an endeavor to uncouple them, the plaintiff was in the exercise of ordinary care for his own safety in and about and while doing that or attempting to do it, you will find for the plaintiff on this first count.

In determining the question of whether or not the defendant was a common carrier engaged in interstate commerce you will consider all the evidence bearing on that question when you have heard as to the function in that respect which this defendant company exercised. You recall the testimony on that point and in determining the question of whether
120 or not there was a failure on the part of the defendant company to comply with the requirements, if you find it was a common carrier engaged in interstate commerce, you will have in mind that the law requires not merely that the defendant should equip a car in the first instance with a coupler which would enable the employe to uncouple that car from another car without going between the ends of the car, but that it should be a duty of the defendant to maintain

Jury. such a coupler on that car, and it is further the law that it is not a question of whether or not the defendant exercised care to equip or maintain such a coupler as I have indicated. It was the defendant's duty to have such a coupler on the car when moved. So you have no concern in this case with the question in that connection of whether or not the evidence shows that the defendant did or did not before this accident happened have any knowledge or opportunity of knowledge of the condition of that coupler. Now, by a coupler that will enable the uncoupling to be effected without the employe going between the rails is meant a coupler that will work. That is such a contrivance, mechanical contrivance, as will respond to the exertions and endeavor properly applied to it for that purpose by the employe to that end. You have heard the evidence on those questions in this case. You will consider
121 that evidence with all the other evidence in this case.

Answer the question whether at this time and place this was such a carrier as was amenable to the act, and whether if it was such a carrier it complied with the act, and whether if it did not comply with the act the plaintiff after he went between the cars was guilty of any negligence in respect of looking out for his own safety.

Coming now to the second count, or, as it is numbered in the declaration, the fourth count, the second one of the two claims which the court has submitted to you in this case. The charge in this second claim is: That the defendant company at the time and place in question permitted to be in the track an unblocked guard rail. You have heard the testimony as to what is meant by the phrase guard rail. You probably have seen these rails in the tracks of railroads. It is placed inside the rail over which the wheels of cars move to accomplish a necessary and useful purpose in the prosecution of the business of railroads, and at the end of the guard rail it is flared toward the center of the track, that is, away from the rail parallel with which it is laid. The claim of negligence here is on the second claim that at this point where the guard rail was bent or deflected from the rail along which it was laid the defendant failed to put a block; that that
122 failure was negligence and that while the plaintiff was doing his work as a switchman in the employ of the defendant and was in the exercise of ordinary care for his own safety his foot was caught in that unblocked guard rail and this injury resulted.

Now, this second claim: If it appeared that the defend- Charge
ant company blocked none of its guard rails; that they were all unblocked it would be my duty to take this phase of the controversy from your consideration, because in that event the law would require the plaintiff to bear the burden of an injury that would come to him. That is in harmony with the rule which provides that an employe assumes the risk of all the dangers in the employment which are known to him or which could be known to him by the exercise of ordinary care on his part, and the conclusion would be if none of the guard rails were blocked that ordinary care on his part would acquaint him with the fact that none of them were blocked, and that if he chose to enter and remain in defendant's employ under these conditions the risk of injury was upon him. However, in this case, on this second claim, in view of the fact that there is evidence to the effect that some guard rails were blocked and some were not blocked,

I submit to you the second claim, the second theory of the
123 claim for your determination of the question whether or not the failure, if some of the guard rails were blocked, the failure of the defendant to block the guard rail in question was negligence. On this second claim, if the failure to block this guard rail was known to the plaintiff at or prior to the injury or would have been known to the plaintiff prior to the injury by the exercise of ordinary care on the plaintiff's part for his own safety, then on this second count your finding must be for the defendant, because, even though some of the guard rails were blocked and some were unblocked, if the plaintiff knew so far as this particular guard rail was concerned that it was not blocked, or by the exercise of ordinary care could have known that it was unblocked, by remaining in the employ of the defendant he assumed the risk of injury from such unblocked guard rail. Or, if you find on this second theory even that the defendant was negligent as is charged here, and further find on this second theory that at the time and just before the injury was sustained the plaintiff was not in the exercise of ordinary care for his own safety, even then and in that event, the plaintiff cannot prevail on the second claim, and in determining the question of whether or not the plaintiff was in the exercise of ordinary care for his own

safety, having in mind the second claim, you are not lim-
124 ited to a consideration of his conduct after he got between the cars, but you have a right and it is your duty

Jury. to consider his conduct, not only as to what—the testimony not only as to what he did after he got between the cars, but the testimony as to his going between the cars in the first instance, speaking now of the second claim. If you find that in going between those cars he was not in the exercise of that care for his own safety, then that is an end of the second claim, and on this second claim he cannot recover; and also he cannot recover under that claim as I said before if before this injury he knew this guard rail was unblocked, or if, before this injury, by the exercise of ordinary care on his part for his own safety he would have known that it was unblocked.

Now, by ordinary care,—and ordinary care is the care which devolves upon the plaintiff, and under the second claim it is also ordinary care that devolved upon the defendant, that is such care as a person of ordinary intelligence, foresight and prudence would exercise for the safety and welfare of whomsoever was involved or had a relation to the subject matter. In determining the question of whether or not the plaintiff was in the exercise of ordinary care for his own safety in the first count, after he got between the cars, and on the second claim in going between and what he did while between the
125 cars, and in determining the question of whether the defendant was in the exercise of ordinary care under the second claim in failing to block this particular guard rail, to test the conduct of the plaintiff and the defendant respectively, as that conduct is shown by all the evidence in this case by what would be done by the ordinary man similarly situated; as I said before, actuated by the motives of prudence that governs the ordinary man of ordinary intelligence. If after the plaintiff went between the cars, under the first theory what he did was not what the person of ordinary prudence and intelligence would have done, even though the defendant violated the law under the first theory, and the injury resulted from the plaintiff's failure in that regard, your finding under the first count must be for the defendant and likewise under the second claim, even though you find against the defendant on the charge of negligence respecting the failure to block the frog.

If you find that the plaintiff's conduct was not the conduct of a person of ordinary prudence and intelligence looking out for his own safety, then that is an end of the case under the second claim.

Now, this is a suit by an individual against a railroad company. The plaintiff is an injured man. No question about it. He has lost a leg. Defendant is a railroad company. 126 The fact that the suit is between an injured man and a railway company is not a reason why in your deliberation and determination you should proceed different from what your proceedings would be if it was a suit between two individuals about a promissory note. The law which controls this case is to be enforced by you as announced by the Court, regardless of where your sympathy or your prejudice, if either you have, may be.

In determining these questions of fact that I have submitted to you, consider all the evidence in the case bearing upon them, disregard the testimony of nobody, because he happens to have a relation to the plaintiff or because he happens to be the plaintiff, or happens to have a relation to or with or be in the employ of the defendant, Take all those things into consideration in determining what weight you will give to testimony. The plaintiff in the case and his witnecesses and witnesses for the defendant to the extent that it appears they are still in the employ of the defendant or to the extent that it is disclosed on the inquiry here that they had any interest in this circumstance out of which the suit has grown, or that they have any interest in the outcome of this suit, take all these things into consideration in determining what weight you will give the testimony of the several 127 witnesses Do not ignore the disposition or the lack of it, as far as it has transpired here, of any witness or witnesses to speak freely, candidly and openly in reply to inquiries put by counsel. Test these questions, examine the evidence of these witnesses, their statements, with a view to determining where the truth is, what facts have been proved here with your common sense judgment that you brought here with you from home, that common sense judgment which is the result of your experience as men in the affairs of this world in your dealings with your neighbors, test the testimony of the witnesses with a view to determining where the truth is as you would go about doing the same thing at home or in your business, and if you find under these instructions the issues on either of these two claims in favor of the plaintiff, your verdict will be for him, if in favor of the defendant your verdict will be for it.

Now, the rule here is that for a civil case the facts to be

jury. established must be shown by a preponderance of the evidence. By that is meant the greater weight of the evidence; that is to say, where there is a conflict, witnesses testifying on opposite sides of the same question, after giving the situation, the whole situation, your best consideration, determines what the believable evidence is, and return a verdict ac-
128 cordingly. If you cannot say where the preponderance of evidence is then you must find for the defendant. On the contrary, if the preponderance of evidence is with the plaintiff on either of these claims which I have endeavored to define to you, with the legal propositions involved in each, then your verdict will be for the plaintiff. If this injury is the result of nobody's negligence and is what is called a mere accident, the plaintiff cannot recover and your verdict in that case must be for the defendant.

Now, on the first theory as to whether or not the defendant was a carrier engaged in interstate commerce, as I have defined to you, and whether or not on that first theory the defendant moved or permitted to be moved on its tracks a car not equipped as required by law, the burden is on the plaintiff to establish those things by a preponderance of the evidence; and on the second count the burden is likewise on the plaintiff to establish that the defendant was negligent in permitting this guard rail at the time and place in question to be unblocked.

The burden is on the defendant to show on the first count and on the second count that the plaintiff was guilty of contributory negligence, and that if he was guilty of contributory negligence that such negligence on the plaintiff's part resulted in the plaintiff's injury. If, however, in making
129 out his own case the testimony of the plaintiff and his witnesses has shown to you, having in mind this rule of the preponderance of evidence, that he was guilty of contributory negligence, as I defined it to you under the first charge and under the second charge, or if it appears under the second charge that this failure to block the guard rail was such a failure as under the rule which I defined to you imposed upon the plaintiff the burden of assuming the risk of any injury by continuing work for the defendant under those conditions, then your finding on that phase of the question may be based upon such evidence, introduced by the plaintiff or given by him. The statement, in other words, that the burden is on the defendant to affirmatively show these

things does not mean that the defendant must come here and Charge
put in evidence to show it, if after all the evidence is examined it appears that the plaintiff's own showing establishes those things in favor of the defendant.

Now, the rule is in this case, if pou find for the plaintiff the plaintiff is to have compensatory damages. That is not a suit for the infliction of a penalty. It is not an action to punish the defendant, or if you find the defendant failed to comply with the United States Safety Appliance Act to
130 penalize that failure. It is only a suit to recover damages.

In determining what the amount of the verdict shall be, if you find in favor of the plaintiff on the question of liability you will take into consideration from all the evidence in the case what the fact is as to the plaintiff's loss. That means the money loss which he has already sustained, the money loss which in the future under all the evidence he will sustain as a result of this injury. You also have a right to take into consideration the pain and suffering as shown by the evidence endured by the plaintiff on account of and as a result of this injury.

I do not recall that there is any evidence in the case as to moneys paid out or liabilities incurred on account of medical services or hospital bills or doctor's bills. On the question of damages you cannot on this phase of the question, in determining what the amount shall be that will compensate the plaintiff, you cannot determine that question with the nicety and exactness with which you might weigh a piece of metal, nor can you measure it as accurately as you could measure a given distance. All you can do on that phase of the question is to use your best judgment, having all the evidence in mind, as to what figure will compensate the plaintiff as to all the elements to which I have specifically referred.

131 After you have so agreed on that amount, on that line, in that way, let your verdict speak your judgment in that regard, assuming, of course, that prior to that you have found in favor of the plaintiff on the question of liability. Of course if you find for the defendant on the question of liability, you will have no occasion to consider the question of compensation.

Mr. McShane: Special findings, if the Court please. I would like for the Court to call the jury's attention to the three special interrogatories.

ury. The Court: Oh, I beg your pardon. At the request of the plaintiff I am submitting to you three questions, to be answered by you. The first question is: "Do you find from the evidence that the defendant was guilty of a violation of the United States Safety Appliance Act, as charged in the first count of the declaration. Answer yes or no."

The second special interrogatory is: "If you find that the defendant was guilty of a violation of the United States Safety Appliance Act as charged, do you find from the evidence that such violation was a proximate or concurring cause of plaintiff's injury? Answer yes or no."

I don't know whether I told you or not, I intended to, even though you find that the defendant violated the United States Safety Appliance Act, if you further find that the fact
132 that the defendant did violate that Safety Appliance Act was not a proximate or concurring cause of the plaintiff's injury, you will find for the defendant on that first theory.

The third Special interrogatory is: "Considering all the evidence, including the plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety? Answer yes or no."

I think from the instructions which I have given to you you will be able to answer those inquiries without anything further from me in that respect.

Mr. Bell: And the defendant objects to the constitutionality of the Safety Appliance Act as construed by this Court as applied to the facts in this case, and I want to specifically object to that portion of the Court's charge holding that an employe is not liable under the Safety Appliance Act, is not guilty of contributory negligence in merely going between the cars. In other words, I want to object to the Court's making a distinction between—

The Court: I get your point.

Mr. Bell: And I want to object to the Court's charge relating to that portion of the Safety Appliance Act which requires the defendant to maintain a coupler that will work
133 at all times and under all conditions by merely working the levers as applied to the facts in this case.

The Court: Save your point.

Mr. Bell: I want to object to that portion of the Court's charge that if no guard rails were blocked the Court would

not submit this question to the jury. I object to that because I think it is not properly in the charge of the Court under the facts in the case. Char

The Court: Well, gentlemen, by what I said on that you are not to infer that I am expressing an opinion by merely submitting this second theory to you that the defendant on the facts in this case is guilty of negligence. That is for you to decide, and you will not infer from what I said on the subject to the counsel as just adverted to that this is a case of negligence.

Mr. Bell: That is all I wanted to call the Court's attention to on that, your Honor. And then under that same charge the Court used the words, in referring to the plaintiff's knowledge of the unblocked condition of the guard rails that he should have knowledge of the fact that this particular guard rail was unblocked. I think that should be that the general condition of the guard rails and not as to any particular guard rail. I want to except to that particular portion of the Court's charge.

134 Mr. McShane: That may be something to which we may agree. I will consent to the Court's charge that if he knew that the custom was not to block the guard rails in that yard then he assumed the risk of this particular guard rail being unblocked. Will that do?

Mr. Bell: That is what I am after, yes.

The Court: Gentlemen of the Jury, if the plaintiff knew or by the exercise of ordinary care on his part would have known that it was the custom in that yard not to block the guard rails then he would assume the risk of injury resulting from his continuing to work in the defendant's employ and injury resulting from such unblocked guard rail.

Mr. Bell: One other thing: The defendant is not required to furnish an absolutely safe device, but only one that is reasonably safe in any particular. Will the Court charge the jury to that effect?

The Court: Save your point on that. That is the safety appliance.

Mr. Bell: No, as to the guard rails. That is, the defendant is not required to adopt any particular plan.

The Court: Gentlemen of the Jury, the defendant is not required to adopt the best device in any respect as to guard rails that is known to the art of railroads. The defendant

ry. is only required to exercise ordinary care in that respect
135 to select guard rails, maintain guard rails of such a character and in such a way as will make the plaintiff's employment reasonably safe.

Mr. Bell: Now, if the Court please, I have preserved my objections and exceptions to the action of the Court in submitting this question of guard rails at all, and if I have not, I want to get them in here, because this is the time.

The Court: Your exception is, you now except to the theory which I have referred to as the second rule or the second claim going to the jury at all?

Mr. Bell: Yes.

Which objections were overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And the defendant further excepted to the failure of the Court to charge the jury as to the law in said cause in accordance with the suggestions theretofore submitted to the Court in writing.

The Court: Gentlemen of the Jury, if you find for the plaintiff, the form of your verdict will be: "We the jury find the defendant guilty and assess the plaintiff's damages against this defendant at the sum of" what you agree upon under the instructions the plaintiff is entitled to.

If you find for the defendant, the form of your verdict will be, "We, the jury, find the defendant not guilty."

Mr. McShane: Let me suggest this, your Honor, I
136 don't know whether it is the practice here, it is the practice in the state court, that they also sign the secial interrogatories.

The Court: When you sign the verdict you can sign each of the special interrogatories.

Mr. McShane: That is, all the jurors sign.

The Court: All the jurors.

And thereupon, the marshal was duly sworn according to law to take charge of the jury, etc., and the jury retired and afterwards returned into Court their written verdict in words and figures, as follows, to-wit:

"We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of $8,000."

Which verdict was signed by all the jurors.

And at the same time, the jury returned into open court the three special interrogatories, the first of which yas:

"Do you find from the evidence that the defendant was guilty of a violation of the United States Safety Appliance Act, as charged in the first count of the declaration? Answer Yes or No." Answer special rogat

And which special interrogatory they answered "Yes", and the interrogatory was signed by all the jurors.

And which second interrogatory was:

"If you find that the defendant was guilty of a violation of the United States Safety Appliance Act as charged, do you find from the evidence that such violation was a proximate or concurring cause of plaintiff's injury? Answer Yes or No."

And which interrogatory was answered "Yes" and signed by all the jurors.

And the third special interrogatory was:

"Considering all the evidence including the plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety? Answer Yes or No."

And which interrogatory was answered "Yes" and signed by all the jurors.

Whereupon, the defendant, by its counsel, moved the Court to set aside the verdict so rendered and to grant a new trial in said cause.

137 And thereupon the jury rendered a verdict against the defendant; whereupon the defendant, by its counsel, moved the Court to set aside the verdict so rendered and to grant a new trial in said cause.

And afterwards, to wit, on the second day of February, A. D. 1910, a day in the said term, the Court overruled the said motion for a new trial to which action of the Court in overruling said motion for a new trial defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, by its counsel, then and there moved to arrest the judgment upon the verdict so rendered, but the Court overruled said motion and gave judgment upon the verdict against the defendant, to which action of the Court in overruling the said motion and entering the said judgment the defendant, by its counsel, then and there duly excepted.

138 And for as much as the matters above set forth do not fully appear of record, the defendant brings this its Bill of Exceptions and prays that the same may be signed and sealed

by the Judge of this Court pursuant to the statute in such case made, which is done accordingly this 28 day of February, A. D. 1910.

KENESAW M. LANDIS, (Seal)
Judge.

Approved:
JAMES C. McSHANE,
Attorney for Plaintiff.

(Endorsed) Filed March 1, 1910, H. S. Stoddard, Clerk.

for error, b. 9,

139 And on to-wit: the ninth day of February, 1910, come the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain petition for writ of error and assignment of errors in words and figures following to-wit:

PETITION FOR WRIT OF ERROR AND ASSIGNMENT OF ERRORS.

United States of America,
Northern District of Illinois, } ss.
Eastern Division at Chicago.

IN THE CICRUIT COURT OF THE UNITED STATES,

In and for the Eastern Division

Of the Northern District of Illinois.

Thomas W. Brown,
Plaintiff,
vs.
The Chicago, Rock Island and Pacific Railway Company,
Defendant.
} No. 29780.

Petition for Writ of Error.

And now comes The Chicagó, Rock Island and Pacific Railway Company, the defendant in the above entitled cause, by M. L. Bell, its attorney, and says that on the second day of February, A. D. 1910, this Honorable Court entered a judgment herein in favor of the plaintiff and against this defend-

ant, in the sum of eight thousand dollars ($8,000.00) with costs, in which judgment, under the proceedings had prior thereto in this court, certain errors were committed to the prejudice of this defendant; all of which will more in detail appear from the assignment of errors which is attached hereto and made a part hereof.

Petition for writ of error filed Feb. 1910.

Wherefore, the defendant prays that a writ of error may be issued in this behalf to the United States Circuit Court of Appeals for the Seventh Circuit, for the correction of the errors so complained of, and that a transcript of the record of the proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Seventh Circuit.

M. L. Bell,
Attorney for Defendant.

140 United States of America,
Northern District of Illinois,
Eastern Division at Chicago. } ss.

Assignment of errors Feb.

In the Circuit Court of the United States,

In and for the Eastern Division

Of the Northern District of Illinois.

Thomas W. Brown,
Plaintiff,
vs.
The Chicago, Rock Island and Pacific Railway Company,
Defendant.
} No. 29780.

ASSIGNMENT OF ERRORS.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers appeared on the trial of the said cause, to-wit:

I.

The Court erred in refusing to instruct the jury to return a verdict for the defendant.

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II.

The Court erred in refusing to instruct the jury to return a verdict for the defendant on the first count of the declaration; and erred in submitting said count to the jury.

III.

The Court erred in refusing to instruct the jury to return a verdict for the defendont on the fourth count of the declaration; and erred in submitting said count to the jury.

141 IV.

The Court erred in holding that the Federal Safety Appliance Law applied to car M. & St. L. 9716, under the evidence in this case.

V.

The Court erred in using the following language in the charge to the jury.

"This Act also provides that if an employe engaged in the service of such carrier sustains an injury by reason of the carrier's failure to obey that law, the employe shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still this first count, that if the employe goes between the cars to effect an uncoupling he is not chargeable with contributory negligence, that is a failure to exercise ordinary care for his own safety by the mere fact of going in between the cars to effect the uncoupling, and he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars."

VI.

The Court erred in using the following language in the charge to the jury:

"In determining the question of whether or not there was a failure on the part of the defendant company to comply with the requirements, if you find it was a common carrier engaged in interstate commerce, you will have in mind that the law requires not merely that the defendant should equip a car in

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the first instance with a coupler which would enable the employe to uncouple that car from another car without going
142 between the ends of the car, but that it should be a duty of the defendant to maintain such a coupler on that car, and it is further the law that it is not a question of whether or not the defendant exercised care to equip or maintain such a coupler as I have indicated. It was the defendant's duty to have such a coupler on the car when moved. So you have no concern in this case with the question in that connection of whether or not the evidence shows that the defendant did or did not before this accident happened have any knowledge or opportunity of knowledge of the condition of that coupler. Now, by a coupler that will enable the uncoupling to be effected without the employe going between the rails is meant a coupler that will work. That is such a contrivance, mechanical contrivance, as will respond to the exertions and endeavor properly applied to it for that purpose by the employe to that end."

VII.

The Court erred in using the following language in the charge to the Jury:

"That is in harmony with the rule which provides that an employe assumes the risk of all the dangers in the employment which are known to him or which could be known to him by the exercise of ordinary care on his part, and the conclusion would be if none of the guard rails were blocked that ordinary care on his part would acquaint him with the fact that none of them were blocked, and that if he chose to enter and remain in defendant's employ under these conditions the risk of injury was upon him. However, in this case, on this second claim, in view of the fact that there is evidence to the effect that some guard rails were blocked and some were not blocked, I submit to you the second claim, the second theory of the claim for your determination of the question whether or not the failure, if some of the guard rails were blocked, the failure of the defendant to block the guard rail in question was negligence."

143 VIII.

The Court erred in making the charge to the jury in refusing to state the proposition requested by defendant as follows:

"If you believe from the evidence that the plaintiff entered

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into a contract with the defendant that he would, in case he received an injury, give notice in writing of such claim to the superintendent, claims attorney or claim agent of said company within thirty days after receiving such injury, which notice should state the time, place, manner and cause of the injury, and the nature and extent of same, and the claim made therefor, and if that said contract provided that the failure to give such notice should be a bar to the institution of any suit on account of said injuries; and if you further find that the plaintiff has failed to give such notice, then your verdict in this case should be for the defendant."

IX.

The court erred in making the charge to the jury in refusing to state the proposition requested by defendant as follows:

"The Court instructs you that if you believe from the evidence that the plaintiff obtained his employment by fraud or deceit upon his part, and that but for such fraud or deceit would not have been in the employ of the defendant, then your verdict should be for the defendant."

X.

The Court erred in making the charge to the jury in refusing to state the proposition requested by defendant as 144 follows:

"The Court instructs you that the act of Congress which requires railroad companies engaged in interstate commerce to equip their cars with automatic couplers imposes upon railway employes the duty to refrain from going between moving cars to couple or uncoule them."

XI.

The Court erred in overruling the defendant's motion to remand said cause to the Superior Court of Cook County, Illinois,

XII.

The Court erred in entering Judgment in favor of the plaintiff against the defendant.

M. L. Bell,
Attorney for Defendant.

(Endorsed) Filed Feb. 9, 1910, H. S. Stoddard, Clerk.

145 And on the same day to-wit: the ninth day of February, 1910, being one of the days of the regular December term of said Court, 1909 before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit: Order 9, 19

ORDER OF FEBRUARY 9, 1910, ALLOWING WRIT OF ERROR. BOND TO ACT AS A SUPERSEDEAS.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company, } 29780.

Upon motion of M. L. Bell, Esq., attorney for the defendant and upon filing petition for writ of error and assignment of errors and presenting a bond on writ of error in the sum of ten thousand dollars which is approved by the Court and ordered to be filed and to act as a supersedeas, It is Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Seventh Judicial Circuit, the judgment heretofore entered herein, and that a citation issue returnable within thirty days from this date.

146 And on the same day to-wit: the ninth day of February 1910, come the Chicago, Rock Island and Pacific Railway Company, as principal and The United States Fidelity and Guaranty Company, as surety and filed in the clerk's office of said Court in said entitled cause its certain Bond on Writ of Error in words and figures following to-wit: Bond of e Feb.

147 Know all Men by these Presents, That we, The Chicago, Rock Island and Pacific Railway Company, as principal, and The United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Thomas W. Brown, in the full and just sum of ten thousand dollars ($10,000.00) to be paid to the said Thomas W. Brown, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this ninth day of February, in the year of our Lord one thousand nine hundred and ten.

rit filed 910.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, at Chicago, in a suit pending in said Court, between Thomas W. Brown, plaintiff, and The Chicago, Rock Island and Pacific Railway Company, defendant a judgment was rendered against the said The Chicago, Rock Island and Pacific Railway Company and the said The Chicgo, Rock Island and Pacific Railway Company, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas W. Brown, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said The Chicago, Rock Island and Pacific Railway Company, shall prosecute its writ to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, (Seal)
F. O. MELCHER (Seal)
Vice President.
(Seal)

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, (Seal)
By THOMAS W. THOMPSON,
Attorney in Fact.
(Seal)

Sealed and delivered in presence of—
GEO. H. CROSBY,
Secretary.

Approved by—
K. M
O. K.
JAS. C. McSHANE,
Atty. for deft.

(Endorsed) Filed Feb. 9, 1910, H. S. Stoddard, Clerk.

150 United States of America, } ss.

Writ filed 191

The President of the United States, To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Thomas W. Brown, Plaintiff vs. Chicago, Rock Island and Pacific Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Chicago, Rock Island and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the Ninth day of February, in the year of our Lord one thousand nine hundred and ten.

H. S. STODDARD,
(Seal) *Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.*
by JOHN H. L. JAMAR
Chief Deputy Clerk.

Allowed by
KENESAW M. LANDIS,
Judge.

rit Northern District of Illinois, } ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 7th day of March A. D. 1910.

H. S. STODDARD,
Clerk United States Circuit Court,
Northern District of Illinois.
by JOHN H. R. JAMAR
Chief Deputy Clerk.

(Seal)

(Endorsed) Filed Feb. 9, 1910 H. S. Stoddard, Clerk.

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148 PRAECIPE FOR TRANSCRIPT OF RECORD.

IN THE CICRUIT COURT OF THE UNITED STATES,

For the Northern District of Illinois

Eastern Division.

Thomas W. Brown,
vs.
The Chicago, Rock Island and Pacific Railway Company. } No. 29780.

To the Clerk of the above entitled Court:—

You will please prepare a transcript of the record in this cause; to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit, under the writ of error heretofore allowed by said Court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Transcript of Record from Superior Court of Cook County.

Plea filed December 16, 1909.

Demurrer filed December 16, 1909.

Stipulation filed January 26, 1910.

Plea of General Issue filed by leave of Court January 26, 1910.

Order of January 26, 1910, called for trial and jury sworn.

Order of January 27, 1910, evidence for plaintiff heard and concluded. Praec trai rec Mai

Order of January 28, 1910, verdict finding defendant guilty and assessing plaintiff's damages at the sum of $8,000.

Judgment of February 2, 1910.

Bill of Exceptions.

Petition for Writ of Error and Assignment of Errors.

Order of February 9, 1910, allowing Writ of Error.

Order of February 21, 1910, extending time to file Bill of Exceptions.

Bond on Writ of Error.

M. L. BELL.
Attorney for Plaintiff in Error.

(Endorsed) Filed March 1, 1910, H. S. Stoddard, Clerk.

149 Northern District of Illinois } ss. Cert of
Eastern Division. }

I, H. S. Stoddard, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court, made in accordance with Praecipe filed in the cause entitled Thomas W. Brown vs. Chicago, Rock Island and Pacific Railway Company, as the same appear from the original Records and Filed thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this Seventh day of March, 1910.

H. S. STODDARD
Clerk

(Seal)

by JOHN H. R. JAMAR
Chief Deputy Clerk.

151 United States of America, } ss.

The President of the United States, To Thomas W. Brown, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, wherein The Chicago, Rock Island and Pacific Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the Judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kenesaw M. Landis Judge of the District Court of the United States, this ninth day of February, in the year of our Lord one thousand nine hundred and ten.

KENESAW M. LANDIS

Service of the above citation accepted on behalf of Thomas W. Brown this 16th day of February, 1910.

JAMES C. McSHANE
Attorney for Thomas W. Brown.

(Endorsed) Filed Feb 21-1910 H. S. Stoddard, Clerk

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 100, inclusive, contain a true copy of the printed record, printed under my supervision, and filed July 27, 1910, on which this cause was argued, heard and determined in the case of Chicago, Rock Island & Pacific Railway Company vs. Thomas W. Brown, No. 1691, October Term, 1909, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-third day of February A. D. 1911.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Fifth Day of October, One Thousand Nine Hundred and Nine, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Nine and of Our Independence the One Hundred and Thirty-fourth Year.

And afterwards, to-wit: On the fourteenth day of March, 1910, in the October Term last aforesaid, came the plaintiff in error, by its counsel, Mr. M. L. Bell, and filed in the office of the clerk of this Court its appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit.
October Term, 1909.

No. 1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS W. BROWN, Defendant in Error.

The clerk will enter my appearance as counsel for the plaintiff in error.

M. L. BELL.

Endorsed: Filed Mar. 15, 1910. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the fourteenth day of March, 1910, in the October Term last aforesaid, came the Defendant in Error, by his counsel, Mr. James C. McShane, and filed in the office of the clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1909.

No. 1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS W. BROWN, Defendant in Error.

The clerk will enter my appearance as counsel for the defendant in error.

JAMES C. McSHANE.

Endorsed: Filed Mar. 14, 1910. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, Begun and Held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the Fourth Day of October, 1910, of the October Term, in the Year of Our Lord One Thousand Nine Hundred and Ten and of Our Independence the One Hundred and Thirty-fifth Year.

And afterwards on the same day, to-wit: On the fourth day of October, 1910, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *October* 4, 1910.

Present: Mr. Justice Day, presiding; Hon. Peter S. Grosscup, Circuit Judge; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. Christian C. Kohlsaat, Circuit Judge; Edward M. Holloway, Clerk; Luman T. Hoy, Marshal.

Before Hon. Peter S. Grosscup, Circuit Judge; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge.

1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
THOMAS W. BROWN.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on Friday, October 14, 1910.

And afterwards, to-wit: On the fourteenth day of October, 1910, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *October* 14, 1910.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge, presiding; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Edward M. Holloway, Clerk; Luman T. Hoy, Marshal.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
THOMAS W. BROWN.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. M. L. Bell, counsel for plaintiff in error, and by Mr. James C. McShane, counsel for defendant in error, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the third day of January, 1911, in the October Term last aforesaid, there was filed in the office of the clerk of this Court the Opinion of the Court in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1910; October Session, A. D. 1910.

No. 1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THOMAS W. BROWN, Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker, and Seaman, Circuit Judges.

The writ of error is to reverse a judgment for $8000.00, in favor of defendant in error against plaintiff in error, for damages for the loss of his left leg, while working for plaintiff in error as a night switchman.

The action was upon two counts (*a*) for violation of the Safety Appliance Act, and (*b*) common law negligence in not blocking the

switches. But inasmuch as the case was submitted to the jury upon each of these counts separately (a verdict of guilty being found in each), and the damages in neither would be changed were the other out of the case, the plaintiff in error must show that there was error in the trial of both counts before a reversal would follow.

Upon the first count, there was a general verdict of guilty, and also a special verdict, answering in the affirmative the three following questions:

"1. Do you find from the evidence that the defendant was guilty of a violation of the United States Safety Appliance Act, as charged in the first count of the declaration?

2. If you find that the defendant was guilty of a violation of the United States Safety Appliance Act, as charged, do you find from the evidence that such violation was a proximate or concurring cause of plaintiff's injury?

3. Considering all the evidence, including plaintiff's conduct, both in going between and while between the cars, do you find that he was in the exercise of ordinary care for his own safety?"

The assignments of error are:

That the relation of master and servant did not exist between the parties;

That no negligence was shown upon the part of the defendant;

That the federal safety appliance act, as applied to the facts of the case, is unconstitutional;

That the Court erred in instructing the jury that the plaintiff could not be guilty of contributory negligence in going between the cars;

That the plaintiff was guilty of contributory negligence;

That the Court erred in refusing to direct a verdict for the defendant.

The instruction complained of is as follows:

"This act also provides that if an employé engaged in the service of such carrier sustains an injury by reason of the carrier's failure to obey the law, the employé shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still the first count, that if the employé goes between the cars to effect an uncoupling he is not chargeable with contributory negligence, that is a failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the uncoupling, and he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the car-."

The facts are stated in the opinion.

GROSSCUP, *Circuit Judge*, delivered the opinion:

The defendant in error, a switchman in a large switch yard, was called upon, at night, to uncouple some cars. Not being in touch, by signal, with the engineer, he conveyed his signals to another switchman in advance of him, who conveyed them to the engineer.

The cars were in motion on a car track at the time. The uncoupling was to be done by means of shoving the cars in motion. Had the safety appliance been in order, this could have been accomplished by defendant in error while walking at the side of the train. But the safety appliance, on the side of the car on which he was working at the time, would not operate. He gave three or four jerks to it, which failed to open the coupler. He then reached in between the cars and attempted to lift the coupler pin with his fingers, which he was unable to do. He then attempted to reach the pin on the adjacent coupler, in order to lift that with his fingers. During all this time he was walking beside the cars, which were moving slowly. The pin lifting rod on the other car projected, not towards him, but away from him; and as he was reaching for the coupler pin on this adjacent coupler, his foot slipped, and a low brake beam striking his foot, shoved it into an unblocked guard rail, where it was run over and his leg cut off. Had he, under these circumstances, abandoned the uncoupling altogether until the car had come to a standstill, he would have been saved the accident. And it is upon his failure to do this, that plaintiff in error predicates its assignments of error respecting contributory negligence and the refusal of the Court to direct a verdict for the defendant.

In support of its assignments of error in this respect, plaintiff in error cites B. C. R. & N. R. Co. v. Gilbert, 128 Fed. 529; Suttle v. Choctaw, Oklahoma & Gulf R. Co., 144 Fed. 668; and Union Pacific R. Co. v. Brady, 161 Fed. 719. In the first of these cases, the negligent act upon which the judgment was based was the switchman's failure to first endeavor to use the lever on the opposite side, because, as the Court said, "the use of that lever was a less dangerous method of parting the cars." That case is different, in this respect, from the one before us.

In Suttle v. Choctaw, Oklahoma & Gulf R. Co., the uncoupling was of the caboose, the Court holding that, the platform of the caboose being open to him to cross over to the other pin lifting rod (the one on his side failing to work) "he selected the more dangerous way of performing his duty when a safe way was within his choice."

In Union Pacific R. Co. v. Brady "there was no substantial evidence of a defective condition of this appliance. But, if this were not so, it was plaintiff's duty to use the lever on the other car. He said he considered it dangerous to cross between the cars to the other side of the track, although no engine was connected with the stock car, and the switch engine was subject to his orders and could have been quickly directed to pull the coal car further away. Similar and equally insufficient excuses were given for not adopting other obvious ways to get to the lever on the stock car. In this particular the case falls within the doctrine of Suttle v. Railroad, etc."

These were cases in the Circuit Court of Appeals for the Eighth Circuit. They present cases, in their determinative facts, different from the case under consideration. In the case under consideration there were twelve cars in a string, the car to be uncoupled being about midway. There was no way, therefore, practically open to defendant in error, to go around to the opposite side. The operation

of uncoupling was to be done while the train was moving, and there was no opportunity to stop the train; and further, defendant in error, when he received his injuries, could not have reached the pin lifting rod on the adjacent car, projecting on the opposite side of the train, as readily as he could reach the pin itself.

In B. C. R. & N. R. Co. v. Gilbert, supra, the following language is used:

"In this way"—after quoting the safety appliance provision—"the duty was imposed upon common carriers by the law to so equip their cars that they could be uncoupled without requiring their servants to go between the ends of the cars. The devolution of this duty upon the carriers necessarily imposed upon their servants the correlative duty of using the equipment thus furnished to them, and of refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity."

Upon the last sentence of this excerpt, the plaintiff in error particularly relies. In our judgment, "the necessity" existed in the case under consideration; for in large yards, where safety appliances refuse to work, to let the cars go uncoupled under the circumstances disclosed here, might result in blocking the operation of the whole road. There is nothing in the facts before us that shows that the defendant in error might, without violating his duty or doing injury to the road, have stopped the operation of the train until he could have gone around on the other side.

Nor can we believe that the interpretation put upon this act, in the part just quoted from the opinion in B. C. R. & N. R. Co. v. Gilbert, is the one intended by Congress. To our minds, the act was intended, not to increase the difficulty of getting compensation for injuries sustained, but to decrease the number of cases in which injuries would happen. It abolishes, in terms, assumption of risk. And where there exists a practical necessity, such as confronted this switchman, to uncouple the cars by some means other than the defective lever, what is done is assumption of risk. Putting his arm between the cars, under such circumstances, and traveling with them, is not *per se* contributory negligence. If there be contributory negligence at all, it depends, not upon his assuming the risk under the circumstances disclosed, but upon the degree of care with which he acts while in the performance of the work under the assumed risk; and that question, we think, all things considered, was fairly submitted to the jury in the instruction of the Court. Donegan v. B. & N. N. Ry., 165 Fed. 869 (2nd Circuit); Taggart v. Republic I. & S. Co., 141 Fed. 910 (6th Circuit).

In overruling the other assignments of error, there is no need of any further expression of our views. The existence of negligence, upon the part of the plaintiff in error, is practically admitted; and the constitutionality of the act has passed into the region of settled law.

The judgment of the Circuit Court is

Affirmed.

A true Copy.
Teste:

____ ____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards on the same day, to-wit: On the third day of January, 1911, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *January* 3, 1911.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge, presiding; Hon. William H. Seaman, Circuit Judge.

Before Hon. Peter S. Grosscup, Circuit Judge; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge.

1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
THOMAS W. BROWN.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the twenty-sixth day of January, 1911, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Notice of Motion, which said Notice of Motion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1691.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
THOMAS W. BROWN, Defendant in Error.

To James C. McShane, Attorney for Defendant in Error:

You will please take notice that to-morrow, Thursday morning, January 26th, at ten o'clock or as soon thereafter as counsel can be

heard, I shall present to the Court a Petition for Writ of Error in the above-entitled matter, at which time and place you may appear if you see fit. I hand you herewith a copy of the said Petition for Writ of Error, and of the Assignment of Errors referred to therein.

Dated, Chicago, Ill., January 25, 1911.

M. L. BELL,
Attorney for Plaintiff in Error.

Received a copy of the above Notice, Petition for Writ of Error, and Assignment of Errors, this 25th day of January, 1911.

JAMES C. McSHANE,
Attorney for Defendant in Error.

Endorsed: Filed Jan. 26, 1911. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twenty-sixth day of January, 1911, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Petition for Writ of Error and a certain Assignment of Errors, which said Petition for Writ of Error and Assignment of Errors are in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1691.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
THOMAS W. BROWN, Defendant in Error.

Petition for Writ of Error.

Your petitioner, The Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in the said Court and that a judgment has therein been rendered on the 3rd day of January, A. D. 1911, affirming a judgment, in the sum of Eight Thousand Dollars, of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division; that the matter in controversy in said suit exceeds One Thousand Dollars besides costs, and that the jurisdiction of none of the Courts above mentioned was or is dependent entirely or in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; that the said cause does not arise under the patent laws, nor under the revenue laws, nor under the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon Writ of Error; and therefore your petitioner respectfully prays that a

Writ of Error be allowed it in the above-entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by your petitioner may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*
By M. L. BELL, *Its Attorney.*

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1691.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
THOMAS W. BROWN, Defendant in Error.

Assignment of Errors.

And now comes the Plaintiff in Error, The Chicago, Rock Island & Pacific Railway Company, by M. L. Bell, its Attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Seventh Circuit, in the above-entitled cause, and in the rendition of the final judgment therein. manifest error has intervened, to the prejudice of the said Plaintiff in Error, in this, to wit:

First. Said Circuit Court of Appeals erred in rendering judgment affirming the judgment of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, for Eight Thousand Dollars and costs, in favor of said Defendant in Error and against said Plaintiff in Error;

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid and in not remanding the said cause to the said Circuit Court for a new trial;

Third. Said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause, said assignment of error being as follows:

The Court erred in refusing to instruct the jury to return a verdict for the defendant on the first count of the declaration; and erred in submitting said count to the jury.

Fourth. Said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, said assignment of error being as follows:

The Court erred in holding that the Federal Safety Appliance Law applied to car M. & St. L. 9716, under the evidence in this case.

Fifth. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause, said assignment of error being as follows:

The Court erred in using the following language in the charge to the jury:

"This Act also provides that if an employé engaged in the service of such carrier sustains an injury by reason of the carrier's failure to obey that law, the employé shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still this first count, that if the employé goes between the cars to effect an uncoupling he is not chargeable with contributory negligence, that is a failure to exercise ordinary care for his own safety by the mere fact of going in between the cars to effect the uncoupling, and he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars."

Sixth. Said Circuit Court of Appeals erred in not sustaining the sixth assignment of error upon the record in said cause, said assignment of error being as follows:

The Court erred in using the following language in the charge to the jury:

"In determining the question of whether or not there was a failure on the part of the defendant company to comply with the requirements, if you find it was a common carrier engaged in interstate commerce, you will have in mind that the law requires not merely that the defendant should equip a car in the first instance with a coupler which would enable the employé to uncouple that car from another car without going between the ends of the car, but that it should be a duty of the defendant to maintain such a coupler on that car, and it is further the law that it is not a question of whether or not the defendant exercised care to equip or maintain such a coupler as I have indicated. It was the defendant's duty to have such a coupler on the car when moved. So you have no concern in this case with the question in that connection of whether or not the evidence shows that the defendant did or did not before this accident happened have any knowledge or opportunity of knowledge of the condition of that coupler. Now, by a coupler that will enable the uncoupling to be effected without the employé going between the rails is meant a coupler that will work. That is such a contrivance, mechanical contrivance, as will respond to the exertions and endeavor properly applied to it for that purpose by the employé to that end."

Seventh. Said Circuit Court of Appeals erred in rendering judgment against the Plaintiff in Error for costs of suit in said Circuit Court of Appeals.

Wherefore, said The Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of

Appeals in the above-entitled cause, to the prejudice of the Plaintiff in Error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Northern District of Illinois, Eastern Division, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

M. L. BELL,
Attorney for Plaintiff in Error.

Endorsed: Filed Jan. 26, 1911. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the twenty-sixth day of January, 1911, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, *January* 26, 1911.

Court met pursuant to adjournment and — was argued by counsel.
Present: Hon. Peter S. Grosscup, Circuit Judge, presiding; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Hon. J. Otis Humphrey, District Judge; Edward M. Holloway, Clerk; Luman T. Hoy, Marshal.

Before Hon. Peter S. Grosscup, Circuit Judge; Hon. Francis E. Baker, Circuit Judge; Hon. J. Otis Humphrey, District Judge.

1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
THOMAS W. BROWN.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the plaintiff in error by its counsel and presents a petition for a Writ of Error and a supersedeas in this cause, and the Court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the twenty-seventh day of January, 1911, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *January* 27, 1911.

Court met pursuant to adjournment and was opened by proclamation of crier.
Present: Hon. Peter S. Grosscup, Circuit Judge, presiding; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit

Judge; Hon. J. Otis Humphrey, District Judge; Edward M. Holloway, Clerk; Luman T. Hoy, Marshal.

Before Hon. Peter S. Grosscup, Circuit Judge; Hon. Francis E. Baker, Circuit Judge; Hon. J. Otis Humphrey, District Judge.

1691.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
vs.
THOMAS W. BROWN.

Error to the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

It is now here ordered by this Court that a Writ of Error in this cause be, and the same is, hereby allowed upon the filing of a bond in the sum of twelve thousand dollars ($12,000.00); said bond to operate as a supersedeas.

And afterwards, to-wit: On the thirtieth day of January, 1911, in the October Term last aforesaid, there was filed in the office of the clerk of this Court a certain Bond, which said Bond is in the words and figures following, to-wit:

Know all men by these presents, That the undersigned The Chicago, Rock Island and Pacific Railway Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto Thomas W. Brown in the full and just sum of Twelve thousand and no/100 Dollars ($12,000.) to be paid to the said Thomas W. Brown, his certain attorneys, executors, administrators and assigns; to which payment, well and truly to be made, we do hereby bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of January, A. D. 1911.

The condition of the above obligation is such that,

Whereas, on the 3rd day of January, A. D. 1911, the Circuit Court of Appeals of the United States for the Seventh Circuit, in a suit then pending in said Court between The Chicago, Rock Island and Pacific Railway Company, plaintiff in error, and Thomas W. Brown, defendant in error, affirmed a judgment of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in the sum of Eight thousand and no/100 Dollars ($8,000.) with interest and costs, against the said The Chicago, Rock Island and Pacific Railway Company, and in favor of the said Thomas W. Brown; and the said The Chicago, Rock Island and Pacific Railway Company having obtained from the said Circuit Court of Appeals a Writ of Error, and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment of the said

Circuit Court of Appeals, and a citation directed to the said Thomas W. Brown, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington within thirty (30) days from the date thereof.

Now, if the said The Chicago, Rock Island and Pacific Railway Company shall prosecute its said writ to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By F. O. MELCHER, *Second Vice President.*

Attest:
CARL NYQUIST,
Ass't Secretary.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By THOMAS W. THOMPSON, *Attorney in Fact.*

O. K.
JAMES C. McSHANE,
[SEAL.] *Att'y for Def't in Error.*

Approved Jan. 30, 1911.
P. S. GROSSCUP.

Endorsed: Filed Jan. 30, 1911. Edward M. Holloway, Clerk.

And afterwards on the same day, to-wit: On the thirtieth day of January, 1911, in the October Term last aforesaid, there was issued out of the clerk's office a certain Writ of Error, which said Writ of Error is in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Chicago, Rock Island & Pacific Railway Company, plaintiff in error, and Thomas W. Brown, defendant in error, a manifest error hath happened, to the great damage of the said Chicago, Rock Island & Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the Supreme Court of

the United States, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirtieth day of January, in the year of our Lord one thousand nine hundred and eleven.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by

PETER S. GROSSCUP,
Presiding Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

In the United States Circuit Court of Appeals for the Seventh Circuit.

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States, a true and complete transcript of the record and proceedings in the foregoing entitled cause this twenty-third day of February, A. D. 1911.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas W. Brown, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit wherein The Chicago Rock Island and Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter S. Grosscup, United States Circuit Judge and Presiding in the United States Circuit Court of Appeals for the Seventh Circuit this 30th day of January, in the year of our Lord one thousand nine hundred and eleven.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

P. S. GROSSCUP, *Judge.*

Service of the above citation accepted on behalf of Thomas W. Brown this 30th day of January, A. D. 1911.

JAMES C. McSHANE,
Attorney for Thomas W. Brown.

[Endorsed:] In the Supreme Court of the United States. The Chicago, Rock Island and Pacific Railway Company, Plaintiff in Error, vs. Thomas W. Brown, Defendant in Error. Citation.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 22, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of Chicago, Rock Island & Pacific Railway Company vs. Thomas W. Brown, No. 1691 October Term, 1910, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-third day of February A. D. 1911.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 22,546. U. S. Circuit Court of Appeals, 7th Circuit. Term No. 925. Chicago, Rock Island & Pacific Railway Company, plaintiff in error, vs. Thomas W. Brown. Filed February 27th, 1911. File No. 22,546.

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Office Supreme Court, U. S.
FILED.
FEB 19 1913
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 230

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS W. BROWN,
Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

M. L. BELL,
Attorney for Plaintiff in Error.

F. C. DILLARD,
Of Counsel.

SMITHROP-WARREN PRINTING COMPANY, CHICAGO.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 230

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS W. BROWN,
Defendant in Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to review a judgment of the Circuit Court of Appeals for the Seventh Circuit, affirming a judgment of the Circuit Court for the Northern District of Illinois, for $8,000, against the railway company in an action at law brought by Thomas W. Brown to recover for injuries received while working as a switchman in the railway company's yards at Chicago. The case was originally brought in the state court; because one count charged a violation of the Federal Employers' Liability Act of April 22, 1908, defendant removed it to the Federal Court on the ground that it arose under the

Federal statutes. Plaintiff's proof failed as to the count based on the Federal Employers' Liability Act, but the case went to the jury upon the first count of the original declaration, which charged a violation of the Federal Safety Appliance Act, and the fourth count of the declaration, which charged a breach of the common law duty to block frogs and guard-rails. The judgment of the Circuit Court was taken by writ of error to the Circuit Court of Appeals, which court affirmed the same. (*The Chicago, R. I. & P. Ry. Co.* v. *Brown,* 185 Fed., 80.) The jurisdiction of the Circuit Court having been acquired in the manner specified, the judgment of the Circuit Court of Appeals is not final, and the case is brought here to review that judgment. (Act March 3, 1891, Section 6, 26 Stat. Large, 828.)

The accident happened May 28, 1909. Brown, plaintiff below, had worked for the defendant since September, 1907, as a switchman on its Chicago Terminal Division, working in all the various switch yards of the defendant in the City of Chicago. At the time of the accident he had been night switchman in the South Chicago yard for about three months. When he first started to work for the company, the frogs and guard-rails in its various yards were not blocked. In December, 1908, the defendant began blocking its frogs and guard-rails, applying a new standard frog which contained blocking, and this work was in progress at the time of the accident. In the South Chicago yard, only a portion of the frogs and guard-rails had been replaced by the

new standard, and Brown was familiar with this fact.

On the night of the accident Brown, in performance of his duties, was attempting to cut off four cars from a string of twelve cars being pushed easterly by a switch engine. He himself was giving the signals to the engineer controlling the movement of the cars. He had signaled with his lantern to the engineer to start, and was walking beside the cars, on the south side of the track, attempting to open the coupling between the cars by the pin-lifting lever, intending after he had done this to signal the engineer to stop, letting the cars which he had cut off drift on down into the yard. The lever failed to open the coupling on the car (car M. & St. L. 9716). He leaned over, reaching in between the cars with his left hand, and attempted to lift the pin of the automatic coupler with his fingers. He could not lift it. Still leaning over and walking with the cars, he attempted to lift the pin on the adjacent coupler, and while he was doing this he got his foot caught in an unblocked guard-rail, and the wheel of the car cut off his leg. There was no defect shown in the coupler attached to car M. & St. L. 9716,—that is, it was not broken or defective. When it was examined the next morning it was found to be in good condition.

Briefly stated, this court is asked to reverse the judgment on the following grounds:

1. That the trial court erred in not directing a verdict for the defendant, on the ground that plaintiff, in leaning between the cars while they were

moving, in the manner specified, was guilty of contributory negligence as a matter of law. This question was preserved by motion for a peremptory instruction.

2. That the trial court erred in instructing the jury, in effect, that the plaintiff was not chargeable with contributory negligence by the mere fact of going between the cars. The court's instruction upon this point is hereinafter set out. The court's ruling in this respect is preserved for review by an exception to the instruction as given.

Specification of Errors Relied Upon.

I.

The court erred in refusing to direct a verdict for the defendant. (Printed Transcript, 74, 109.)

II.

The court erred in using the following language in the charge to the jury:

> "This act also provides that if an employe engaged in the service of such carrier sustains an injury by reason of the carrier's failure to obey the law, the employe shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still the first count, that if the employe goes between the cars to effect an uncoupling he is not chargeable with contributory negligence, that is a failure to exercise ordinary care for his own safety by the mere fact of going in between the cars to effect the uncoupling, and he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the car." (Printed Transcript, 79, 110.)

BRIEF OF THE ARGUMENT.

I.

The court erred in refusing to direct a verdict for the defendant, on the ground that plaintiff was guilty of contributory negligence as a matter of law.

Southern Pacific Co. v. *Seley*, 152 U. S., 145.

Kilpatrick v. *Choctaw, Oklahoma and Gulf R. Co.*, 121 Fed., 11; 195 U. S., 624.

B. C. R. & N. R. Co. v. *Gilbert*, 128 Fed., 529.

Suttle v. *Choctaw, Oklahoma & Gulf R. Co.*, 144 Fed., 668.

Union Pacific R. Co. v. *Brady*, 161 Fed., 719.

Delk v. *St. Louis & S. F. R. Co.*, 220 U. S., 580.

Schlemmer v. *Buffalo, R. & P. R. Co.*, 220 U. S., 590.

II.

The court erred in instructing the jury that the plaintiff could not be guilty of contributory negligence in going between the moving cars.

Cases under I, *supra*.

ARGUMENT.

We appreciate to the fullest extent that this is one of the cases which this court characterized, in *Chicago Junction R. Co.* v. *King,* 222 U. S., 222, as of the class which it was the purpose of the judiciary act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals, and that this court under such circumstances will "go no further than to inquire whether plain error is made out." (*Texas & Pacific Ry. Co.* v. *Howell,* 224 U. S., 577.) Nevertheless, a brief consideration of the evidence in this case will show, we think, that such plain error is made out.

By way of preliminary, it is to be noted that the Circuit Court of Appeals apparently sided with our contention in that court that the trial court erred in submitting to the jury the fourth count of the original declaration.

This fourth count charged a violation of the common law duty to block frogs and guard-rails. The facts were that for the first fifteen months of plaintiff's employment in the defendant's various yards in the City of Chicago, all the frogs and guard-rails were without blocking. About five years prior to the accident they had all been blocked, and for reasons of its own the defendant at that time ordered the blocking taken out. At any rate, when plaintiff started to work for defendant in September, 1907, there was no blocking anywhere on the Chicago Terminal. In December, 1908, it was decided to restore the blocking, and the new standard frogs and guard-

rails supplied after that time contained blocking. At the time of the accident, six months later, about half the unblocked frogs and guard-rails in the yard where the plaintiff was employed had been replaced by blocked frogs and guard-rails.

It is settled beyond argument, by decisions of this court, that a switchman assumes the risk in working with unblocked frogs, and that a railroad company is not negligent in not blocking its frogs, if it sees fit not to block them. (*Southern Pacific Co.* v. *Seley* (1894), 152 U. S., 145; *Kilpatrick* v. *C. O. & G. R. Co.* (1904), 195 U. S., 624, affirming 121 Fed., 11.) The trial court submitted this question to the jury, however, on the theory that as part of the frogs and guard rails were blocked and part were not blocked, the jury might find (although this count did not so charge) that this condition of affairs was a negligent act on the part of the defendant, and that the plaintiff had not assumed the risk of it.

Obviously, this has no bearing on the question of assumption of risk or on whether defendant's act in changing the frogs was negligent. The Circuit Court of Appeals apparently considered that the action of the trial court was erroneous in this respect (printed transcript, p. 104) but affirmed the judgment under the first count.

This was on the ground that the jury, in response to special interrogatories submitted under the first count on plaintiff's request found that the defendant was guilty of a violation of the Safety Appliance Act, that such violation was a proximate or concurring cause of the injury, and that plaintiff was in the exercise of ordinary care.

I.

THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT FOR THE DEFENDANT ON THE GROUND THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

The first count of the declaration charged a violation of the Federal Safety Appliance Act in that the defendant used a car which could not be uncoupled without the necessity of men going between the ends of the cars. We are aware that under the law as laid down by this court in the *Taylor case*, 210 U. S., 281, and in *C., B. & Q. R. Co.* v. *United States*, 220 U. S., 559, it is settled that the failure of the coupler to work at any time sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever. The mere fact that the pin would not lift when plaintiff endeavored to lift it makes a case of negligence under the first count. But we still contend that, as a matter of law, plaintiff was guilty of contributory negligence in going between these moving cars, knowing, as he knew, that he would have to pass over an unblocked guard-rail, and having, as he had, absolute control of the situation with reference to giving signals to the engineer and thereby controlling the movement of the train. There was no haste or hurry in regard to his work; he was not acting in obedience to specific directions of any kind, and he had the option of choosing for himself the manner in which he would make the cut of the cars. In spite of the fact that there were two safe methods whereby he could have made this "cut"

without going between the cars, he voluntarily, for his own purposes, chose the most dangerous method of doing it.

The case of *Gilbert* v. *B. C. R. & N. R. Co.* (C. C. A., 8th Circuit, 1904), 128 Fed., 529, is a case very much like this case, except that the facts there were stronger for the plaintiff, because the defendant railway company had actually adopted the practice of blocking frogs and guard-rails, and had permitted the blocking to come out of a certain guard-rail, *of which fact the plaintiff was ignorant.* The same thing happened which happened in this case, and the Circuit Court of Appeals disposed of the matter as shown by the following quotations. We ask the court's pardon for repeating so freely from the opinion, but the language is so apposite and the reasoning so clear that we think it should settle this case. The italics are ours:

> "Let us apply these rules to the facts of this case. It is so dangerous for the employes of railroad companies to go between the ends of cars to couple or to uncouple them that Congress passed an act on March 2, 1893, which made it the duty of common carriers to equip all their cars engaged in interstate traffic with couplers which can be uncoupled 'without the necessity of men going between the ends of the cars' (27 Stat., 531, c. 196, 3 U. S. Comp. St., p. 3175), and the legislatures of many of the states have enacted laws of a similar nature to regulate carriers within their respective borders. In this way the duty was imposed upon common carriers by the law to so equip their cars that they could be uncoupled without requiring their servants to go between the ends of the cars. *The devolution of this duty upon the carriers neces-*

sarily imposed upon their servants the correlative duty of using the equipment thus furnished to them, and of refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity. Under this legislation the breach of either of these duties became a failure to exercise ordinary care, and constituted actionable negligence. The two cars which the plaintiff sought to uncouple were supplied with mechanical devices for separating them without requiring the employes of the railroad company to go between the ends of the cars. These devices were not defective in construction or repair. There were two of them, either one of which would ordinarily enable the servant to uncouple the two cars. One of them had its lever on the east side of the train, where the plaintiff was at work, and could be operated from that station. The other had its lever upon the west side of the train, and could be utilized only from that side. The plaintiff first endeavored to uncouple the cars by the use of the device on the east side of the train while the string of cars was stationary. When the train was drawn tight, so that there was no slack between the cars, or, as the witnesses expressed it, 'when the slack was tight,' the cars could not be uncoupled either with or without the use of the levers. When the plaintiff first attempted to separate the cars the slack was tight, and consequently he could not pull the pin by the use of the lever. The engine then pushed the cars to the south, and as they moved along the plaintiff attempted several times to pull the pin by means of the lever upon which he still kept his hand, and failed. He then stepped in between the ends of the cars while they were moving at the rate of between two and three miles an hour, and tried to uncouple them by seizing the chain above the pin with his hands and raising them. *The act of placing himself between the ends of the cars to uncouple them without first endeavoring to do so by the*

use of the lever on the opposite side was an act of negligence, because the use of that lever was a less dangerous method of separating the cars. Where there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method. *Morris* v. *Duluth S. S. & A. Ry. Co.*, 108 Fed., 747, 749, 47 C. C. A., 661, 664, *Gowen* v. *Harley*, 56 Fed., 973, 983, 6 C. C. A., 190, 200; *Coal Co.* v. *Reid*, 85 Fed., 914, 29 C. C. A., 475; *McCain* v. *Railroad Co.*, 76 Fed., 125, 126, 22 C. C. A., 99, 101; *Russell* v. *Tillotson*, 140 Mass., 201, 4 N. E., 231; *Gleason* v. *Railway Co.*, 73 Fed., 647, 19 C. C. A., 636; *Cunningham* v. *Railway Co.* (C. C.), 17 Fed., 882; *English* v. *Railway Co.* (C. C.), 24 Fed., 906. Not only this, but if the plaintiff had adopted the less dangerous method, if he had proceeded to the other side of the train and had uncoupled the cars by the use of the west lever, he would not have walked in the space between the rails where his foot was caught, and he would not have been injured. Even if he had first vainly tried to operate the lever, he would not have walked over the space where he was hurt, and he would have escaped injury. So that there seems to be no escape for a reasonable man, who considers impartially these facts, from the conclusion that the plaintiff was guilty of negligence in refusing to use the lever on the west side of the train and in entering and walking between the moving cars for the purpose of uncoupling them, nor from the conclusion that the 'negligence directly contributed to his injury.'"

Again, it is stated on page 535:

"Counsel next say that, even if the plaintiff failed to exercise reasonable care to protect himself against the ordinary dangers of walking along the track between the cars and uncoupling them, he did not fail in the exercise of ordinary

care to protect himself against the particular danger of the unblocked guard rail, because he was ignorant of its condition, and could not have been negligent about it."

After discussing the cases in support of this contention the court disposes of it as follows:

"In the case under consideration the act of the plaintiff in entering and walking between the moving cars exposed him to the danger from the unblocked guard, to which he would not otherwise been subjected. In the former cases the plaintiffs' negligence was too remote to contribute to the injuries they suffered, while in the latter it was primal, proximate and causal. While it is true in cases of little danger, when the negligence of the plaintiff is remote, and does not clearly contribute to his injury—as in the case of *Choctaw, O. & G. Ry. Co.* v. *Holloway*—that a servant may not be guilty of contributory negligence in exposing himself to a risk of which he is ignorant, and of which an ordinarily prudent person would not have been aware, although he fails to exercise ordinary care to protect himself against known dangers, that rule is not of universal application. It is not applicable to cases in which the danger is known and great, and the negligence of the servant is clearly and directly contributory to the injury. * * * The case at bar falls within this rule. The place into which the plaintiff ventured was dangerous—so perilous that Congress had enacted a statute to relieve the plaintiff from the duty of exposing himself to its danger. The peril of the place arose in large part from unavoidable obstructions upon the roadbed as a path for a pedestrian, caused by the rails and ties, and from the necessity of constantly changing the bed, its ties and rails, in order to keep them in proper repair. The danger from the negligence of the defendant in permitting the guard rail to become and remain unblocked

> was of the same nature as, and was in reality a part of, the danger to which the plaintiff exposed himself when he stepped between the cars, and his ignorance of the particular danger from the unblocked guard rail, while he knew the general and imminent danger of the place, constituted no legal excuse for his want of ordinary care, and cannot be permitted to relieve him from its fatal effect."

The cases cited by the court below in its opinion are readily distinguishable. *Donegan* v. *B. & N. N. Ry. Co.,* 165 Fed., 869, was a case where plaintiff was ignorant that the frog in which his foot was caught was unblocked, and had no opportunity of signaling the engineer or other brakeman to stop the train. He was acting in an emergency, because it was necessary that the "cut" should be made before reaching a certain switch. Nothing of the kind here.

Taggart v. *Republic Iron & Steel Co.,* 141 Fed., 910, was another case where the undisputed testimony showed that plaintiff was ignorant of the fact that the frogs were unblocked. In other words, plaintiff, in stepping between the cars, did not know that he was running the risk of getting his foot caught in an unblocked frog; whereas, under the facts in this case and the decisions of this court, Brown was chargeable with knowledge of the danger from this frog.

The court below, in speaking of the *Gilbert* case, said:

> "In the first of these cases, the negligent act upon which the judgment was based was the switchman's failure to first endeavor to use the lever on the opposite side, because, as the court

said, 'the use of that lever was a less dangerous method of parting the cars.' That case is different in this respect from the one before us."

This quotation shows that the court below did not give the Gilbert case careful consideration, as the foregoing quotation from the opinion in that case shows that it was practically identical with this case. The statement of facts in the Gilbert case recites:

> "The lever to pull the pin on the north end of the Street stable car was on the east side of the car. The lever to pull the pin on the south end of the Northwestern car was on the west side of the car. There was no defect in the couplers nor in the apparatus for pulling the pins. It was impossible to pull the pins when the string of cars was drawn tight so that there was no slack between them, or as the witnesses expressed it, 'when the slack was tight.'"

The Circuit Court of Appeals justifies Brown's act in going between the cars by a statement that a necessity existed therefor, being the necessity of not stopping the traffic; yet the court overlooks the fact that the *record* in the *Gilbert* case showed that it was the *custom of the brakemen to step in between moving cars* when the lever would not work, and there is no such showing here.

The cases of *Suttle* v. *Choctaw, Oklahoma & Gulf R. Co.*, 144 Fed., 668, and *Union Pacific R. Co.* v. *Brady*, 161 Fed., 719, are to the same effect. It is worthy of note also that the Circuit Court of Appeals for the 8th Circuit, which decided the foregoing cases, has always been quite in accord with this court on the proposition that the Safety Appliance Act is absolute and makes the Railway Com-

pany an insurer of the safety of couplers. (*United States* v. *A. T. & S. F. Ry. Co.*, 163 Fed., 517; *United States* v. *D. & R. G. R. Co.*, 163 Fed., 519; *Johnson* v. *Great Northern R. Co.*, 178 Fed., 643.)

Since the opinion was filed in the court below, this court has confirmed the rule we contended for, namely, that the Safety Appliance Act alone did not abolish the doctrine of contributory negligence. (*Delk* v. *St. Louis & San Francisco R. Co.*, 220 U. S., 580; *Schlemmer* v. *Buffalo, Rochester and Pittsburg R. Co.*, 220 U. S., 590.)

There cannot be much room for any other conclusion. Certainly, Congress did not intend, by anything contained in the Safety Appliance Act, to authorize a brakeman or switchman to go between moving cars whenever he may please, without being held guilty of contributory negligence therefor. It seems to us that the very enactment of such a law is a warning to all brakemen and trainmen not to go between moving cars.

Nor can there be any doubt that Brown's act in going between these cars and running the risk of getting his foot caught in the frog was a negligent act. Suppose the cut was being made at the end of a trestle, or near a cattle guard at a highway crossing, or near an elevated crossing over a public street, such as abound in the City of Chicago, and that Brown, while walking beside the car, had stepped into the trestle, or cattle guard, or down into the street; would there have been any doubt in the court's mind that Brown was guilty of contributory negligence in attempting to make the cut the way he did? This court has put itself on record (in

Southern Pacific Company v. *Seley*, 152 U. S., 145) that an act identical in its essential features with the act of the plaintiff in this case was almost reckless. Seley, it will be recalled, was injured by getting his foot caught in an unblocked frog while standing between two cars to make a coupling in the days before the Safety Appliance Act was passed. This court used the following language (page 156):

> "That Seley was guilty of contributory negligence, and therefore not entitled to recover, we think is also obvious. Knowing, as he did, the character of the frog, and the liability of being caught in it, and after having been specially warned by the assistant brakeman, he yet persisted in exposing himself to an obvious danger. His object to couple the cars might have been successfully accomplished without placing his foot in the frog.
>
> *Recklessness could hardly go further.* The evidence would warrant no other conclusion than that he took the risk of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The court should have directed a verdict for the defendant."

The only difference between the *Seley* case and the case at bar is that Congress, in the Safety Appliance Act, has in the present case placed an absolute standard of duty upon the railway company. It has not altered the standard of due care to be exercised by the employes. It has insured the coupler, but has not, in this Act, insured the employe. If any change has been made in the standard of due care, it has been an implied warning by Congress to each employe that to step between mov-

ing cars is dangerous. *If Seley was reckless in* 1887, *Brown was reckless in* 1909.

This case, therefore, should be reversed without remanding.

II.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE PLAINTIFF COULD NOT BE GUILTY OF CONTRIBUTORY NEGLIGENCE BY THE MERE FACT OF GOING BETWEEN THE CARS.

This portion of the court's charge of which we complain was as follows:

> "This Act also provides that if an employe engaged in the service of such carrier sustains an injury by reason of the carrier's failure to obey the law, the employe shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. *It is also the law,* having in mind still this first count, *that if the employe goes between the cars to effect an uncoupling he is not chargeable with contributory negligence,* that is a failure to exercies ordinary care for his own safety *by the mere fact of going in between the cars to effect the uncoupling,* and he is required before he can recover to exercise ordinary care for his own safety *after* he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the car."

Even if we are mistaken in holding that the court erred in refusing to direct a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence as a matter of law, yet a consideration of the above language of the court in its

charge to the jury will show a plain case of reversible error. It will be seen that the court instructed the jury that the plaintiff *could not be charged with contributory negligence in going between the cars,* although he might be negligent in his behavior *after* he got there.

Since this case was decided by the Circuit Court of Appeals, this court has held plainly, in the Delk and Schlemmer cases, *supra,* that the defense of contributory negligence is not taken away by the Safety Appliance Act. If we are wrong in contending that plaintiff was guilty of negligence as a matter of law in going between the cars, and if it were indeed a question for the jury whether or not he was exercising due care, yet it must be said that we were entitled to have this question fairly submitted to the jury under proper instructions, and not under an instruction which told them that in going between the cars, he could not possibly be guilty of contributory negligence.

There were no facts in this case upon which plaintiff could have relied as to his safety in going between the cars; he had no assurance from any one that it would be a safe thing to do; the Act of Congress did not by any possible construction say to him that he could go in there between the cars with impunity, but by the strongest implication had warned him that it was dangerous; he himself was in full control of the situation, and had power either to stop the train by a signal and make the coupling while the train was standing, or to go around on the opposite side. Certainly whether he was exercising proper care in going into a place he knew was dan-

gerous, when there were two safe ways open to him, if it were a question for the jury at all, was a question upon which the jury might have found against him; by what right or reason then, could the District Court in this case instruct the jury that the plaintiff could not possibly be guilty of negligence in going between the cars?

If, therefore, this court should be of the opinion that the question of Brown's negligence was one for the jury to decide, yet we were entitled to have the jury properly instructed; and for the error in the foregoing instruction the case should be reversed and remanded.

Respectfully submitted,

M. L. BELL,
Attorney for Plaintiff in Error.

F. C. DILLARD,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 230.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THOMAS W. BROWN,
Defendant in Error.

Writ of Error to the Circuit Court of Appeals, Seventh Circuit.

Brief for Defendant in Error.

STATEMENT.

For convenience, we shall hereinafter refer to Brown as plaintiff, and to the Railway Company as defendant.

The case was submitted to the jury under the first and fourth counts of the declaration. The first count is predicated upon a violation of the Safety Appliance Act, and it also contains the allegations necessary to bring the case within the provisions of the Federal Employer's Liability Act, viz.: that defendant was engaged, and plaintiff em-

ployed in interstate commerce. (Rec., 5.) The fourth count charges negligence in failing to fill in, or block, the space between the running rail and the guard rail in which space plaintiff's foot was caught. (Rec., 9, 10.)

The evidence shows that the coupler on the car in question was in such a defective and inoperative condition that it became necessary for plaintiff to go in between the cars to affect the uncoupling. It is not claimed that the evidence was insufficient in that regard. The evidence bearing upon the question of plaintiff's alleged contributory negligence at least tended to show that plaintiff was employed by defendant as a night switchman, and the accident occurred at night; that the train was moving *about as fast as a man would walk;* that it was plaintiff's duty to uncouple the cars; that he made several attempts to do so from the side of the car by means of the coupling lever, but finding that he could not thus uncouple the cars, he, while holding on the car in front of him, and walking along *outside* of the rail in the direction in which the cars were moving, reached in to raise the coupling pin by hand, and while thus engaged his left foot *accidentally descended upon the running rail,* the top of which was about level with the ground outside of the rail, and his foot thereupon *slipped off and inside the rail,* and before he could get it out, the brake beam on the car behind him knocked his foot forward and into an open space, in the form of a boot-jack, between the flared end of the guard rail and the running rail, and his foot was thus fastened and he was knocked down and one of the wheels ran

over his left leg above the knee necessitating its amputation.

The evidence also at least tended to show that plaintiff did not know that this space was not filled in or blocked, but upon the contrary he supposed that it was, and besides he did not intentionally step inside of the running rail, but as above stated his foot accidentally slipped inside of the running rail.

For the purpose of separating the counts and the charges of negligence therein contained, so that the judgment might be sustained upon the count in reference to the coupler, without reference to the other count, the court, in conformity with Illinois practice, and at the request of the plaintiff, submitted to the jury three special interrogatories, which were as follows:

1. "Do you find from the evidence that the defendant was guilty of a violation of the United States Safety Appliance Act, as charged in the first count of the declaration? Answer Yes or No."

2. "If you find that the defendant was guilty of a violation of the United States Safety Appliance Act, as charged, do you find from the evidence that such violation was a proximate or concurring cause of plaintiff's injury? Answer Yes or No."

3. "Considering all the evidence, *including plaintiff's conduct, both in going between and* while between the cars, do you find that he was in the exercise of ordinary care for his own safety? Answer Yes or No." (Rec., 88, 89.)

The jury answered each of these interrogatories in the affirmative. (Rec., 88, 89.) As the Court of Appeals affirmed the judgment under the first,

or Safety Appliance count, and as it is not even suggested that any error that may have occurred in reference to the fourth count could or did affect the finding under the first count, we shall devote our entire argument in support of the proposition that the judgment may and should be affirmed under the first count without reference to the fourth count or the charge of negligence therein contained.

Counsel seek reversal of the judgment upon two grounds, first, that the court erred in refusing to direct a verdict for defendant upon the ground, as claimed, that the evidence shows that plaintiff was guilty of contributory negligence *as a matter of law,* and second, upon the ground that the court erred in charging that plaintiff was not chargeable with contributory negligence by the mere fact of his going between the cars.

Our answer to these claims is, first, that the case falls within the provisions of the Federal Employer's Liability Act, which provides that "No such employe who may be injured or killed *shall be held to have been guilty of contributory negligence* in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." (U. S. Comp. St. Supp., 1909, p. 107.) And hence plaintiff cannot be charged with contributory negligence, and neither could defendant have been prejudiced by the instruction complained of even though it was not warranted under the Safety Appliance Act, and, second, that even if the case does not fall within the provisions of the Employers' Liability Act, and even though plaintiff's conduct in going

between the cars might constitute contributory negligence under the Safety Appliance Act, and even though the court erred in its instruction in that regard, yet under proper instructions the jury specially found that plaintiff was not guilty of contributory negligence either in going between or while between the cars, and the evidence warranted such finding, and hence the question as to whether he could, or could not, be charged with negligence in going between the cars, or whether the court's charge in that respect was or was not proper is immaterial. In addition, we contend that he was not chargeable with negligence *in going between the cars* and that the court's instruction in that particular was proper.

BRIEF OF ARGUMENT.

I.

THE EMPLOYERS' LIABILITY ACT IS APPLICABLE TO THE CASE, AND HENCE THERE WAS NO QUESTION OF CONTRIBUTORY NEGLIGENCE INVOLVED, AND THE COURT'S CHARGE IN THAT RESPECT WAS NOT PREJUDICIAL TO DEFENDANT.

As previously stated, the first count, which charges a violation of the Safety Appliance Act, likewise alleges that at the time of plaintiff's injury defendant was engaged in interstate commerce and that plaintiff was employed in such commerce. (Rec., 5.) Whether the Employers' Liability Act is, or is not, applicable depends upon whether these allegations were proven. The evidence bearing upon that question was in part as follows:

It was stipulated:

"That the *defendant's railway was engaged in interstate commerce* * * *, its principal main line extending from Chicago to the Mississippi River, across the State of Illinois. Its line also extended into Colorado, Texas and elsewhere." (Rec., 26.)

For three months prior to, and at the time of the accident, plaintiff was employed by the defendant as member of one of its night switching or transfer crews, which consisted of an engineer, fireman, two switchmen and a conductor. (Rec., 26.) The accident occurred in defendant's South Chicago yards. The yards were quite extensive, and defendant employed therein four switch engines during the day

time and one at night. (Rec., 26.) It was stipulated that:

"*In the yards in question,* the Rock Island Company handles cars that were delivered by other roads and were destined to other roads, as well as its own cars. *Part of these cars were engaged in interstate commerce* and were used by the companies who owned them in interstate commerce." (Rec., 26.)

And plaintiff testified:

"*The Rock Island cars are used for everything,* I think. I have seen waybills for cars going *out of there,* waybills for *cars going out of other states and going to other states.* I have seen cards on the sides of cars that give their destination. This is what we use to go by when we get up trains. *These cars were used generally, anywhere they wanted them in the state and out of the state.* It made no difference in the class of cars. *They operated cars in those yards of all the roads in the United States, I guess. These various cars were engaged indiscriminately between the different states.* * * * In a general way *our crew* was engaged in transfer work, taking cars from different parts of the city and delivering them to different roads. We have taken cars back from the Illinois Central back to the Rock Island. *The cars that we took* from the Rock Island to the other roads would be designated by cards on the side and the waybills. *Some* would be designated to some parts of the east with grain, and some to the west. * * * I have seen *lots of them* designated as far as Denver, Cedar Rapids and Kansas City. I have seen some designated to New York, by way of the Lake Shore. *In a general way they were for every point indiscriminately in the state and outside of the state.*" (Rec., 27.)

It will be noted that *the general work of plaintiff's crew* was in handling the cars above referred to. Plaintiff further testified:

"There were two elevators on our line to South Chicago that the Rock Island takes care of. Taking these cars to the elevators was a considerable part of the work that was done in those yards. These cars come from different roads, and *from the west, from Iowa* and where they raise wheat, over the Rock Island. Cars delivered to the eastern roads were *destined to New York, Pittsburgh* and other places. We delivered to the Fort Wayne, Lake Shore, Nickel Plate roads, all of which enter Illinois *within a few miles east of the yards.* (It is admitted by defendant that the *majority* of cars delivered to eastern roads *were for points outside of Illinois,* and that the *majority* of cars received from eastern roads *came from points east of the Indiana line.*)" (Rec., 40.)

Speaking of the time of the accident, Tearney, the conductor, testified:

"I was foreman of the crew the night Brown was hurt. We had 12 cars—8 were to be cut off. * * * The M. & St. L. car (the car with the defective coupler) was loaded for Englewood. * * * It was loaded at South Chicago and would be unloaded at Englewood. We had eleven other cars on that train for the C. & E. I. They were loaded with grain from the South Chicago elevator." (Rec., 43, 44.)

The destination of these other eleven cars, beyond the fact that they were to be delivered to the C. & E. I. R. R., was not shown. The conductor further testified:

"*This engine we had was used to handle all kinds of cars.* This time we *happened* to be handling just these cars." (Rec., 43-4.)

Plaintiff also testified:

"On the night of the accident, we had hold of some cars. A number of them were going to the C. & E. I. and part of them to Englewood, and we were going to take out those that were going to the C. & E. I. on one track and the number that were going to Englewood on another track. * * * We got these cars off No. 4. I think 10 or 12 cars. *The engine was attached* to the west end, headed east. * * * On this particular movement we were going to shove four or five cars in on 2 and then shove another one in on 4." (Rec., 27.) "The car that I could not raise the coupler with the bar was a Minneapolis & St. Louis car. It was marked M. & St. L. I don't know where it runs out of Minneapolis; I know it runs out of St. Louis, because I have seen it." (Rec., 31.)

The following afterward occurred:

"Mr. McShane: Mr. Bell, you and I since adjournment have learned just about where this St. Louis & Minneapolis road runs. *It runs from Minneapolis to Des Moines, Iowa, and out into North Dakota and does not come in Illinois. Is that right?* Mr. Bell: *That is my understanding, Mr. McShane.*" (Rec., 53.)

Defendant's car inspector testified from his records that the M. & St. L. car in question was received at 44th street from the C. & A. Railroad on May 26, 1909. (Rec., 61.) The accident occurred two days later, viz., May 28, 1909. (Rec., 26.) The evidence shows that the C. & A. R. R. extends to St. Louis and Kansas City and delivers their cars to the Rock Island at 44th street. (Rec., 40.)

In view of the foregoing evidence, it seems too clear for argument that defendant was engaging in interstate commerce; in fact, as we have seen, *it was so stipulated.* The only debatable question is as to

whether plaintiff was employed in such commerce within the meaning of the act.

It is apparent from the foregoing evidence that plaintiff was employed by this interstate carrier upon this interstate road, generally and indiscriminately in interstate and intrastate commerce; and that both classes of commerce were hauled over the same tracks and switches and by the same engine and crew. Of the 12 cars the engine was attached to at the time of the accident, the car with the defective coupler was carrying an intrastate load; whether the other eleven cars were carrying interstate or intrastate loads was not shown. It will also be observed that the car with the defective coupler belonged to an interstate road that did not enter Illinois and that the car was delivered to defendant two days before the accident by still another interstate road, and hence the evidence, we think, indicates that it was a car which was being generally employed in interstate commerce. It will also be observed that the engine which was attached to these cars at the time of the accident was regularly employed indiscriminately in both interstate and intrastate commerce, and plaintiff was employed at the time of the accident with this engine as much, if not more, than with the cars which it was moving.

We think that the words, "While he is employed by such carrier in such commerce," refer to the servant's general employment at the time of his injury, and not merely to the particular act or duty which he is performing.

The word "while" has been frequently defined as meaning "during the time that" or "as long as."

(*Lawrence* v. *Leidigh*, 50 Pac., 600; 58 Kan., 594; 62 Am. St. Rep., 631; *Silvey* v. *Lindsay*, 107 N. Y., 55; 13 N. E., 444; *Wolcott* v. *Holcomb*, 97 Ore., 361; 56 N. W., 837; 37 L. R. A., 215.) And the word "employed" has been frequently defined as follows:

"To be employed in anything means *not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it.*" (*U. S.* v. *Catherine*, 25 Fed. Cas., 332; *U. S.* v. *Morris* (14 Pet.), 39 U. S., 464; *The Alexander*, 1 Fed. Cas., 302; *Ritchie* v. *People*, 155 Ill., 98.)

Hence the words "while he is employed in such commerce" may properly be construed to mean during the time that he is engaged or under contract to work in interstate commerce, and they thus include the servant's general employment at the time of his injury.

This court has held that the words "used in moving interstate traffic," as used in the original Safety Appliance Act, "should not be taken in a narrow sense" (*Johnson* v. *So. Pac. R.*, 196 U. S., 1; *Schlemmer* v. *Ry. Co.*, 205 U. S., 1), and as the purpose of both acts is the same the words "while he is employed in such commerce" should not be taken in a narrow sense. We think it clear that by the use of these words Congress intended to include within the act all employes whom it was in its power to include.

In *Colasurdo* v. *Cent. R. R. of N. J.*, 180 Fed., 832, the court, after calling attention to the fact that the Employers' Liability Law of 1906 was held unconstitutional because it included those in reference

to whom Congress had no power to legislate, and in speaking of the act in question said:

"I think it should therefore be construed as intending to include within the term 'persons employed in such commerce' *all those persons which could be so included within the constitutional power of Congress; that is to say, the act meant to include everybody whom Congress could include.*"

See, also, to the same effect, *Felt* v. *D. & R. G. R. Co.*, 48 Colo., 249; 110 Pac., 215; *Zikos* v. *O. R. & N. Co.*, 179 Fed., 898. That such was the intention of Congress is clearly shown by the proceedings in Congress in reference to the passage of this act, and to which proceedings it is proper to refer. (*Johnson* v. *So. Pac. R. Co.*, 196 U. S., 1.) Vol. 42, part 5, of the Cong. Rec., 60th Cong., 1st Session, contains the debates, reports of committees, etc., in the House and Senate in reference to the act. Pages 4426 *et seq.* contain the proceedings in the House and pages 4526 *et seq.* contain the proceedings in the Senate. By reference to these pages, it will be seen that a number of proposed amendments seeking to limit the application of the act to the servant's employment at the precise time of his injury were voted down, and that the majority report upon this bill in the Senate states that:

"This bill * * * is intended in its scope to cover *all commerce to which the regulative power of Congress extends.*"

If, then, the question is, as to whether it was within the power of Congress to legislate in reference to one employed as plaintiff was at the time of his injury, it has been practically answered by this court in the case of *Mondou* v. *N. Y. N. H. & H.*

R. Co., 223 U. S., 1, and *Southern R. Co.* v. *U. S.*, 222 U. S., 20. Those cases, as we read them, hold that it is within the power of Congress to legislate in reference to all men, engines and cars whose work, duties or employment have a real and substantial relation to or connection with interstate commerce. In the *Mondou* case the court said:

"The act of interstate commerce is done *by the labor of men* and with the help of things; and these *men* and things *are the agents and instruments of the commerce.* If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted."

And in the *Southern Ry.* case, in sustaining the constitutionality of the Safety Appliance Act of 1903, which applies to *all engines and cars used upon any interstate highway,* the court said:

"Speaking only of railroads which are highways of both interstate and intrastate commerce, *these things are of common knowledge:* Both classes of traffic are at times carried in the same car; and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, and generally are used interchangeably in moving both; *and the situation is much the same with trainmen, and switchmen, and like employes, for they usually, if not necessarily, have to do with both classes of traffic.* Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, *or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains.*"

If it is within the power of Congress to legislate in reference to the movements of all engines and cars used upon a railroad, provided only that the railroad is a highway of interstate commerce, we fail to see why the power does not also extend to the men employed in the movement of such engines and cars; and especially if the men are employed generally and indiscriminately, as plaintiff was, in moving both kinds of traffic upon an interstate highway; and when they are employed at the very moment of their injury in working with an engine regularly used indiscriminately in interstate and intrastate traffic.

The work of men so employed surely has a real and substantial relation to interstate commerce.

We have seen that plaintiff was employed indiscriminately in hauling and switching interstate and intrastate cars, and that the engine which was pushing the cars at the moment of his injury was likewise indiscriminately employed in both kinds of traffic, and it is clear that even though the cars which the engine and crew were then handling were then carrying intrastate loads, an injury to any member of the crew, or an injury to, or derailment of, the engine or cars, would almost necessarily affect the promptness, security and efficiency of the interstate traffic which these men and this engine were employed to move. The natural result of plaintiff's injury was to interrupt and delay the work of the crew in and about the movement of interstate cars, and consequently his work and the work of the engine and crew at the time of the accident had a real or substantial relation to or connection with in-

terstate commerce, and if so, he was employed in such commerce within the meaning of the act.

It was the purpose of the act to establish a uniform system of control and it supersedes all state laws upon the same subject. Plaintiff's employment at the time of his injury was the same as the employment of switchmen generally, and to construe the act as intending to apply only to cases where the employe is actually engaged in assisting in the movement of some car or cars upon an interstate journey would render it useless in the majority of cases; and if the injured switchman, or his relatives in case he is killed, are required to prove the origin and destination of the cars with which he was working at the time of his injury, or death, the act would be of little benefit in any case.

In *Behrens* v. *Ill. Cent. R. R. Co.*, 192 Fed., 582, the plaintiff was a member of a switching crew that was indiscriminately engaged in moving interstate and intrastate commerce, but he was injured while his engine and crew were moving cars in intrastate commerce. It was there said that the act in question "should be as broadly and as liberally construed as possible," and that:

"I consider that the *usual and ordinary employment* of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, *fixes his status, and fixes the status of the railroad,* and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where

the employe himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

See, also, *Lamphere* v. *O. R. & N. Co.*, Cir. Ct. of Appls., 9th Cir., 196 Fed., 336; *N. P. Ry.* v. *Maerkl*, Cir. Ct. of Appls., 9th Cir., 198 Fed., 1; *Johnson* v. *G. N. R.*, 102 C. C. A., 89; *Cent. R. R. Co.* v. *Colasurdo*, Cir. Ct. of Appls., 2nd Cir., 192 Fed., 901; *Zikos* v. *O. R. & N. Co.*, 179 Fed., 893; *Jones* v. *C. & O. Ry.* (Ky.), 149 S. W., 951.

There has not been, up to the present time, any authoritative statement as to the scope of the act, and there is a wide difference of opinion among the courts upon this subject. It will tend greatly to expedite the litigation already existing, and to lessen that which will otherwise follow, if this court will say something as to the scope of the act, even though it may not be found necessary to the decision of this case.

The trial court, at the request of the defendant, held that plaintiff was not employed in interstate commerce, and hence the act did not apply, to which action plaintiff excepted. (Rec., 52.) The only difference so far as plaintiff's rights under the different acts are concerned, is in reference to the question of contributory negligence, and that question was submitted to the jury under the act least favorable to plaintiff. In this situation, we see no reason why this court should not apply the Employers' Liability Act if the evidence warrants it.

II.

PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE, EITHER IN GOING BETWEEN THE CARS OR WHILE BETWEEN THE CARS, AND THERE WAS NO PREJUDICIAL ERROR IN THE COURT'S CHARGE IN THAT RESPECT.

This question is only material in the event that the court should hold that the case does not fall within the provisions of the Employers' Liability Act.

We contend that under the Safety Appliance Act alone, plaintiff cannot be charged with contributory negligence merely in going between the cars, because were it not for the Safety Appliance Act his conduct in going between the cars would charge him with assuming the risk, and since that act expressly excuses him from the charge of assuming the risk, his conduct in going between the cars cannot be invoked as a defense by calling it contributory negligence, hence the portion of the court's charge complained of was proper.

It is immaterial, however, in this case, whether plaintiff's conduct in going between the cars should, or should not, be considered in determining the question of contributory negligence, or whether the court did, or did not, err in its charge in that respect, for, as we have seen, the following interrogatory was submitted to the jury: "Q. *Considering all the evidence, including plaintiff's conduct both in going between* and while between the cars, do you find that he was in the exercise of ordinary care for

his own safety? Answer yes or no." And it was answered "Yes." (Rec., 88-89.)

Although the court informed the jury that in determining the question of liability under the *first* count, it should not take into consideration plaintiff's conduct in going between the cars, yet it also instructed the jury that in determining the question of liability under the *fourth* count it should consider his conduct in going between the cars as well as his conduct while between the cars. In this connection the court defined ordinary care and instructed the jury that if it should find defendant negligent in failing to block the guard rail, and should further find:

"That at the time and just before the injury was sustained plaintiff was not in the exercise of ordinary care for his own safety, even then and in that event the plaintiff cannot prevail on the second claim, and in determining the question of whether or not the plaintiff was in the exercise of ordinary care for his own safety, having in mind the second claim, you *are not limited to a consideration of his conduct after he got between the cars, but you have a right and it is your duty to consider his conduct, not only as to what he did after he got between the cars, but the testimony as to his going between the cars in the first instance,* speaking now of the second claim. If you find *that in going between those cars he was not in the exercise of that care for his own safety, then that is the end of the second claim, and on this second claim he cannot recover.*" (Rec., 81-2.)

From this it follows that the question as to whether plaintiff was negligent either in going between, or while between, the cars was directly involved in the case; and the question was properly

submitted to the jury, and the jury found specially that he was not guilty of negligence in either respect. From this we think it follows that the only material question remaining is as to whether the evidence did or did not so clearly and conclusively show that plaintiff was guilty of contributory negligence either in going between or while between the cars that the court erred in refusing to direct the verdict for the defendant.

It may be observed in passing that the Illinois practice authorizes the submission of special findings, and they are made controlling over the general verdict if in conflict with it. (*C. & N. W. R. Co.* v. *Dunleavy*, 129 Ill., 132.) It is also the Illinois practice that a defendant cannot be heard to say that there was no evidence to support such a finding, or that it is contrary to the weight of the evidence, unless it moves in the trial court to set the finding aside.

The rule in this regard is stated in *Voight* v. *Anglo Am. P. Co.*, 104 Ill. App., 426, where the court said:

"In the written motion for a new trial none of the special findings are objected to as contrary to the evidence or as not supported by the evidence. The assignment that the verdict is against the weight of the evidence applies to the general verdict of not guilty. It does not include the special findings. It is too late to object to them for the first time in this court. *They stand here as fully sustained by the evidence.* (*Avery* v. *Moore*, 133 Ill., 74; *Pa. Coal Co.* v. *Kelly*, 156 Ill., 15; *Empire M. Co.* v. *Brady*, 164 Ill., 61.)"

See, also, to the same effect, *P. C. C. & St. L. R. Co.* v. *Bovard*, 121 Ill. App., 52; *Tate* v. *Mo. Pac. Ry. Co.*, 157 Ill. App., 108.

There was no motion of that kind made by defendant in this case, nor did it assign as error that there was no evidence to warrant the finding. We are not required, however, to depend upon the conclusiveness of this finding, for the evidence fully sustains it.

Counsel's claim seems to be that plaintiff was guilty of negligence because he went between the cars, instead of stopping the train, and going around to the other side of the train and uncoupling the cars by means of the lever on the other side of the other car.

The evidence showed that the engine was coupled to the northwest end of the train of twelve cars; it was the intention to uncouple the four cars furthest from the engine, and kick, or shove them in upon the side track. The engine pulled the train in a northwesterly direction up over the switch, whereupon plaintiff threw the switch and then gave Lillis, the other switchman, who was nearer the engine, a signal to back up, which signal Lillis transmitted to the engineer, who was within his view, but was not within plaintiff's view. It was more properly Lillis' duty to uncouple the cars as he was nearest to the point where they were to be uncoupled, but as it was Lillis' first night in the yard, plaintiff, after throwing the switch, walked northwest up towards Lillis, and when he was about opposite Lillis, the cars, at the point they were to be uncoupled, were passing him. The cars were moving about as fast as

a man would ordinarily walk, and plaintiff, thereupon, took hold of the lever on the south, or east end of the fifth car, and made several unsuccessful attempts to raise the coupling pin by means of the lever. When he saw he could not thus uncouple the cars, he took hold with his right hand of a bar running crosswise on the north or west end of the fourth car and *leaned over* and reached in between the cars and took hold of the chain with his left hand and made an unsuccessful effort to raise the coupling pin on the fifth car, which he had previously attempted to raise by means of the lever; but he was unable to raise the pin and he thereupon seized the chain of the other coupler and attempted to raise the coupling pin on that coupler, and while doing so, his left foot *accidentally descended upon the running rail and slipped off in between the rails,* and before he could get it out, the brake beam of the fifth car knocked his foot forward into the jaw of the guard rail, which was parallel with and immediately inside of the running rail, and was so flared inward, that the two rails formed a sort of a boot-jack; and when his foot was thus fastened he was knocked down, and his left leg was run over and so crushed that it became necessary to amputate it. His testimony in this regard was in part as follows:

"I supposed it was my duty to cut the cars, or I could do it, as it would be Lillis' place. Either one was supposed to do that, whichever one would be there, but as a general thing Lillis did, because that was the movement he was supposed to do it. * * * After I threw the switch and gave the signal I walked up to near No. 1 switch. In the mean-

time the train was shoving back on No. 2. When I got up there I seen the cut where I wanted to make it and it had passed Lillis in the meantime and I tried to pull the pin."

He then described how he tried to pull the pin with the lever (Rec., 28), and continuing, said:

"The pin would not come up. I made four or five attempts. The train was going *about as fast as you would usually walk.* The coupling rod on the other car (the east car) would be on the east end of the car, but it would be on the opposite side. * * * There was no lever extending from the coupler to the side of that other car; that is, to the side I was on. * * * When I could not raise this coupling pin (on the west car) with the lever I reached in and got hold of the chain that is attached to this lever (on the west car) and got hold of it; thought maybe it might be twisted, but I pulled it and found slack in it and I grabbed the other chain (on the east car). * * * I grabbed the chain on the one ahead of it (the east car) and raised the pin by means of my hand with the chain. *I felt my foot go. I was walking with my feet on the outside of the rail.* I had hold of a slide that is at the bottom of the door—kind of a door runner—on the car ahead of me. I was facing the way the cars were going. I had hold with my right hand on the car ahead of me, right over that slide. I reached my left hand to the pin. I was walking southeast, right along the side of the lead. (Rec., 29.) I reached over as far as I could, *and tried to keep my feet on the outside of the rail,* and I tried to catch the chain of the coupler on the east car and *I stepped on top of the rail and my foot slipped,* and there is a low brake beam on the car that is following; it hit my foot, just about the top of my shoe, from behind, and it drove it in between the guard rail and the rail. A guard rail is a rail that sits on the inside of the rail opposite the frog. * * * My foot would go down between the ball and the top *only* at the end of the guard rail.

It would have to go in boot-jack fashion. When I got my foot in there the wheel ran up on my limb, to the knee, and tore it off. My limb was cut off about half way between the knee and the hip. I am six foot and a quarter of an inch tall. * * * We all had lanterns. (Rec., 30.) *With that blocking in there a man's foot cannot become caught.* I can't see any difference in getting caught between the wing of the frog and the wing of the guard rail. I do not see that you could get caught in one any easier than you could in the other. They are the same distance apart." (Rec., 30.)

On cross examination he said:

"*All of the frogs were blocked in this yard, to the best of my knowledge.* (Rec., 32.) I noticed at the time I was hurt that some of these guard rails in this yard 'A' were unblocked. *I first noticed that night that there were unblocked guard rails in that yard—the night I got hurt, the 28th of May. That is the first night I ever took any particular notice of it. I did not know that night when I went to work that there were any unblocked guard rails in that yard at all. I didn't know that there were any unblocked guards at all there until I got hurt; that is right. That is the first intimation I had that there was an unblocked guard rail in that 'A' yard at South Chicago, when I got my foot caught on that night in it. Prior to that time I thought that all the guard rails at South Chicago were blocked.* (Rec., 33.) I said the track was nicely surfaced with cinders up to the level of the ties. It would be smooth walking inside and out. I said that *I attempted to lean over* as far as I could to reach that pin on each of the knuckles between the cars, *without getting my feet inside the rails.* Q. Was there any particular reason why you could not step over the top of that rail inside to pull the pin between the cars? A. *I never took no chances getting my feet inside. I did get them inside by slipping.*" (Rec., 38.)

The car ran about a half car length after he was caught before it stopped. (Rec., 41, 35.)

He further said that the track was standard gauge "4 feet and 8 inches and some fraction," and that the couplers were in the center of the cars. (Rec., 35.) Continuing, he said:

"To the best of my knowledge all of the frogs in South Chicago yard 'A' were blocked. I never examined all of them. I never examined any one in particular, but just passed over it and saw it blocked. I was under the impression that it was all blocked. I never noticed one that was not blocked. * * * I was always under the impression that all the frogs and guard rails were blocked in all the yards I worked at." (Rec., 36, 37.) (Witness' impression stricken out; exception by plaintiff.) "Q. In this frog proposition, you said you never noticed any frog or guard rail that was not blocked. What is the fact as to whether in these yards as a rule dirt does or does not accumulate in the throat or the wing of these frogs? A. Yes, I have seen dirt accumulate a little there, so that it would almost cover the guard rail entirely. * * * A man could not see the block if it was covered with dirt, which is very often the case. It accumulates in any yard, in the wings of the frogs and guard rail." (Rec., 40.)

We do not believe that all reasonable men would agree without hesitation or dissent that no ordinarily prudent switchman in plaintiff's position, and under similar circumstances, would have acted as he did.

If he had stopped the train, he probably could not have raised the pin in the other coupler *while the cars were standing still,* either by going between the cars from the west side or by going around to the east side and using the lever on the other car, for the track was on a slight *down grade* towards the

east (Rec., 40), and the action of the engine in stopping the train, or at any rate, the grade would probably have caused the slack to run out and remain out when the cars were standing. If he had stopped the train he could only reach the other side either by crawling between, over or under the cars—and in doing so he would have incurred the risk of being injured in the event the train should be unexpectedly started—or by walking to the east end of the train, a distance of four car lengths, and walking west the same distance on the north side to the point where the uncoupling was to be made, in all a distance of at least eight car lengths. And if he had thus reached the other side, he would not then be on the side of the train upon which the crew were working, and as the train was on a curve (Rec., 33, 34), he would have been out of the view of both the engineer and fireman. The jury was warranted in finding that such a course of conduct would be neither safe, convenient nor practicable, certainly not more so than the course he adopted and undertook to follow. He testified he did not intend, or expect to step inside of the rail, and if he had not *accidentally* stepped *upon* the rail, and his foot then *slipped off and inside,* he would have been in a position of safety so far as the guard rail was concerned. He testified the track was well surfaced, and that he supposed all the frogs and guard rails were blocked, hence, he would not naturally anticipate danger from a guard rail even if his foot should accidentally slip inside of the running rail. The question, however, is not merely as to which was the better or safer course, but is as to whether the court

can say that all reasonable men would agree without hesitation or dissent, that none but an imprudent man would have adopted the course which plaintiff adopted.

The alleged rule that a man is guilty of negligence in adopting a dangerous method of doing a given thing, when he could have adopted a safer method "rests on the hypothesis that he can perform his duties as well and efficiently in one way as the other." (*H. A. & B. R. Co.* v. *Walters,* 98 Ala., 435; 8 So. Rep., 360.)

A man cannot ordinarily be held guilty of negligence *as a matter of law* merely because he adopted a dangerous course when there was a safer one open; such cases usually present a question of fact for the jury. (7 Thomp. on Neg. (White's Supp.), Sec. 5374, p. 814; *Taylor* v. *Felsings,* 164 Ill., 8.)

In *U. S.* v. *El Paso & S. W. R. Co.* (District Court of Arizona, Jan. 30, 1907, not yet reported, see Index, Digest of Decisions under the Federal Safety Appliance Act by Kent, p. 15), the court, in holding that a car with the coupler in such a condition that a switchman is required to go around to the opposite side to uncouple it, was not a compliance with the act, said:

"There is no assurance that the conditions of the track or the length of the train would be such at the time that the car might need to be uncoupled that the brakeman could go around the end of a train to the operating rod on the other side of the adjoining car and effect the uncoupling *in the time allowed for such purpose,* or that the condition of the car or the adjoining car would be such that he could climb over the top of the car and down the other side, *even if sufficient time were allowed,*

without incurring fully as much danger to his person as by stepping in between the ends of the cars and effecting the uncoupling by hand. *It is reasonably certain that in a great majority of cases, if not, in fact, invariably, the brakeman, confronted with the necessity of adopting one of these three courses, would go in between the cars and effect the uncoupling by hand.*"

This latter statement is undoubtedly true, and if plaintiff did what brakemen would do "in a great majority of cases, if not in fact, invariably," he was not guilty of contributory negligence; in fact, he could not be held guilty of such negligence *as a matter of law* unless the court can say that all reasonable men would agree that none but an imprudent switchman would have done as he did.

This court can only determine the *controlling fact* as to what an ordinarily prudent switchman would do under similar circumstances from its knowledge and experience (which is necessarily limited) as to what switchmen's duties require of them; as to the amount of work they are required to perform in a given time; and as to what they are, or are not permitted to do under the varying circumstances and situations in which they are placed; and especially as to what ordinarily prudent switchmen usually do under similar circumstances. It is needless to say that a jury drawn from the different walks of life are, as a rule, better informed in reference to these matters, and hence better qualified than the court to decide such questions.

The court in the *El Paso* case, *supra*, was of the opinion that switchmen in a great majority of cases, if not invariably, would have acted as plaintiff did.

And the jury in this case was doubtless of the same opinion, yet this court, in order to hold plaintiff guilty of contributory negligence, as a matter of law, must find *as a fact* that *all* reasonable men, without hesitation or dissent, would agree that plaintiff did not do what an ordinarily prudent switchman would do under the same circumstances.

In the case of *Taggart* v. *Republic I. & S. Co.* (Sixth Cir.), 73 C. C. A., 144, the court held that a switchman, who stepped between moving cars to uncouple them, because the coupler was inoperative upon the side of the train upon which he was working, and had his foot caught in a frog as plaintiff did, was not guilty of contributory negligence as a matter of law. And it further held that even if he was chargeable with such negligence, as he did not know the frog was unblocked, the danger of his foot becoming fastened by it was not a danger which he could have reasonably anticipated, and hence his negligence, if any, was not a proximate cause of his injury. This latter proposition is also sustained by the cases of *Henick* v. *Quigley*, 41 C. C. A., 299 (opinion by Mr. Justice Day), and *Ry. Co.* v. *Craig*, 19 C. C. A., 631.

The Second Circuit Court of Appeals in the case of *Donnegan* v. *B. & N. Y. Ry. Co.*, 91 C. C. A., 555; 165 Fed., 869, also held that a switchman was not guilty of contributory negligence, as a matter of law, in stepping between and walking between moving cars in an effort to uncouple them when the coupler on his side of the car was inoperative.

In 5th Thompson on Neg. (2nd Ed.), Sec., 5593, p. 148, the author says:

"In modern cases, a majority of the courts, however, have taken the view that for a railway brakeman or switchman to get his feet caught in unblocked frogs or switches, while absorbed in his duty, always dangerous, of attempting to couple or uncouple cars, is not contributory negligence as matter of law, but, at most, presents a question for a jury."

(See also to the same effect: *I. C. R.* v. *Heath,* 228 Ill., 314; *St. L. I. M. & St. L. R.* v. *York,* 92 Ark., 554; 123 S. W. Rep., 376; *Sprague* v. *Wis. Cent. R.* (Minn.), 116 N. W. Rep., 104; *K. C. M. B. R.* v. *Flippo* (Ala.), 35 So. Rep., 475; *Furritten* v. *C. St. P. M. & O. R.,* 104 N. W. Rep., 225; *M. J. & K. C. R.* v. *Bromberg,* 141 Ala., 258; 14 R. R. R., 823; *Brady* v. *K. C. St. L. C. R.,* 206 Mo., 509.) It was also been repeatedly held, when the old style link and pin couplers were used, that a switchman was not guilty of negligence *per se* in walking between moving cars in an effort to couple or uncouple them. (*I. C. R.* v. *Cozby,* 174 Ill., 109; *Ashman* v. *F. & P. M. R.,* 90 Mich., 567; *Eastman* v. *L. S., etc., R. Co.,* 101 Mich., 597; s. c., 60 N. W. Rep., 309; *O'Neill* v. *Chicago, etc., R. Co.,* 62 Neb., 358; s. c., 86 N. W. Rep., 1098; *Bird* v. *L. I. R. Co.,* 11 App. Div. (N. Y.), 134; *Curtis* v. *C. R. Co.,* 95 Wis., 460; s. c., 70 N. W. Rep., 665.)

The cases cited by counsel from the Eighth Circuit are contrary to the weight of authorities upon this question; at any rate there is a radical distinction between those cases and the case at bar, viz., in each of those cases the injured switchman *know-*

ingly and intentionally stepped between the rails to effect the uncoupling, whereas, we have seen, the plaintiff did not knowingly, or intentionally, step between the rails, *but accidentally stepped upon the rail, and his foot slipped inside of the rail.* Those cases certainly go to the extreme, and yet this court, in order to sustain defendant's contention, must go further than any of them, and hold that a switchman must at his peril and under all circumstances prevent his foot, or feet, from accidentally slipping inside of the rail, else he will be held guilty of contributory negligence as a matter of law.

If the court agrees with us that plaintiff cannot be held guilty of contributory negligence, as a matter of law, *the judgment should be affirmed independent of the propriety or impropriety of the trial court's charge that plaintiff could not be chargeable with contributory negligence by reason of his conduct in going between the cars,* for that portion of the charge could not have influenced the jury in finding as it did, that he was not guilty of contributory negligence, *either in going between* or while between the cars, for, as we have seen, the court expressly instructed the jury that they must determine the question of his negligence, *both in going between* and while between the cars, in deciding the second branch of the case (Rec., 81, 82); and by its special finding it expressly determined that question in plaintiff's favor.

Even though the court should hold that plaintiff's conduct in reaching in between the cars, and permitting his foot to accidentally slip in between the rails, was negligence *as a matter of law,* under the common

law, yet he cannot be charged with negligence in that respect under the Safety Appliance Act. In the case of *Schlemmer* v. *R. Co.*, 205 U. S., 1, this court did not feel called upon to determine whether contributory negligence was available as a defense under the Safety Appliance Act, but it held, on the assumption that it was so available, that the switchman's conduct *in going between the cars*, which, were it not for the statute, would charge him with assuming the risk, could not be urged as a defense under the name of contributory negligence. In the same case on subsequent appeal (220 U. S., 590) the court held that contributory negligence is a defense under the Safety Appliance Act, but, as we read this later decision, it did not overrule the prior holding that plaintiff could not be charged with such negligence in going between the cars. The rule laid down in the first *Schlemmer* case has been followed in a number of cases besides the one at bar. (*C. J. Ry. Co.* v. *King*, 94 C. C. A., 652; *So. Ry. Co.* v. *Allen*, 106 S. W., 416.) It may be that the rule as stated in the first *Schlemmer* case may not be applicable in all cases, and under all circumstances, but we think it is applicable to a case like this, where the cars, at the time the man went between them, were not moving faster than a man usually walks.

We respectfully request the affirmance of the judgment.

Respectfully submitted.

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